DOCKET

SUPREME COURT

OF THE UNITED STATES

No. 09-1088

Title	Vincent Cullen, Acting Warden, Petitioner v. Scott Lynn Pinholster
Docketed	March 11, 2010
Lower Ct.	United States Court of Appeals for the Ninth Circuit
Case Nos.	(03-99003, 03-99008)
Decision Date	December 9, 2009

Questions Presented

---Date---	--------Proceedings and Orders----------
Mar 9 2010	Petition for a writ of certiorari filed. (Response due April 12, 2010)
Mar 9 2010	Appendix of Vincent Cullen, Acting Warden filed.
Mar 31 2010	Order extending time to file response to petition to and including May 12, 2010
May 12 2010	Brief of respondent Scott Lynn Pinholster in opposition and appendix filed.
May 12 2010	Motion for leave to proceed in forma pauperis filed by respondent.
May 24 2010	Reply of petitioner Vincent Cullen, Acting, Warden filed. (Distributed)
May 25 2010	DISTRIBUTED for Conference of June 10, 2010.
Jun 14 2010	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Jun 14 2010	Petition GRANTED.
Jul 22 2010	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including August 9, 2010.
Aug 9 2010	Brief of petitioner Vincent Cullen, Acting, Warden filed.
Aug 9 2010	Joint appendix filed. (Statement of costs filed)
Aug 16 2010	CIRCULATED.
Aug 16 2010	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)
Aug 16 2010	Brief amici curiae of Pennsylvania, et al. filed. (Distributed)
Aug 24 2010	SET FOR ARGUMENT Tuesday, November 9, 2010.
Aug 30 2010	The time within which to file respondent's brief on the merits is extended to and including September 20, 2010. (Distributed)
Sep 2 2010	Record received from U.S.C.A. for 9th Circuit. 1(1 envelope)
Sep 10 2010	Record received from U.S.D.C. for Central District of California. (8 boxes)
Sep 20 2010	Brief of respondent Scott Lynn Pinholster filed. (Distributed)
Sep 24 2010	Brief amicus curiae of American Civil Liberties Union filed. (Distributed)
Sep 27 2010	Brief amicus curiae of Disability Rights Legal Center filed. (Distributed)
Oct 20 2010	Reply of petitioner Vincent Cullen, Acting, Warden filed. (Distributed)
Oct 28 2010	Additional record received from U.S.C.A. for 9th Circuit. (1 box)
Nov 9 2010	Argued. For petitioner: James W. Bilderback, II, Supervising Deputy Attorney General, Los Angeles, Cal. For respondent: Sean K. Kennedy, Federal Public Defender, Los Angeles, Cal.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No.

091088 MAR 9 - 2010

OFFICE OF THE CLERK

In the Supreme Court of the United States

VINCENT CULLEN, ACTING WARDEN OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN, *Petitioner*,

v.

SCOTT LYNN PINHOLSTER, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a federal court may reject a state-court adjudication of a petitioner's claim as "unreasonable" under 28 U.S.C. § 2254, and thus grant habeas corpus relief, based on a factual predicate for the claim that the petitioner could have presented to the state court but did not.

2. Whether a federal court may grant relief under 28 U.S.C. § 2254 on a claim that trial counsel in a capital case ineffectively failed to produce mitigating evidence of organic brain damage and a difficult childhood because counsel, who consulted with a psychiatrist who disclaimed any such diagnosis, as well as with petitioner and his mother, did not seek out a different psychiatrist and different family members.

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PETITION FOR WRIT OF CERTIORARI

Vincent Cullen, Acting Warden of San Quentin State Prison[1] (the State), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit *en banc* opinion affirming the district court's judgment is reported at *Pinholster* v. *Ayers*, 590 F.3d 651 (9th Cir. 2009). The Ninth Circuit three-judge panel opinion reversing the district court's judgment is reported at *Pinholster* v. *Ayers*, 525 F.3d 742 (9th Cir. 2008). The United States District Court decision, addendum to decision, and judgment granting habeas corpus relief are unreported. The California Supreme Court's orders summarily denying habeas corpus relief are unreported. The California Supreme Court's opinion affirming respondent's conviction and sentence on appeal is reported at *People* v. *Pinholster*, 824 P.2d 571 (Cal. 1992). Each is reproduced in the Appendix to this Petition (App.).

JURISDICTION

The Ninth Circuit *en banc* opinion was filed on December 9, 2009. App. 1-193. This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), reads, in

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[1] Acting Warden Cullen has succeeded Warden Robert L. Ayers as respondent Scott Lynn Pinholster's custodian at San Quentin State Prison. See Sup. Ct. R. 35.

relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – [¶] (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or [¶] (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. [¶] (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that – [¶] (A) the claim relies on – [¶] (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or [¶] (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and [¶] (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

A. Introduction

In preparation for a possible penalty phase at respondent's trial, a defense-retained psychiatrist examined respondent and reported to trial counsel that respondent was a psychopath who suffered from no mitigating mental or medical disability. In later state habeas corpus petitions claiming ineffective assistance of counsel, respondent alleged—and, under state law, the state court provisionally assumed—that counsel could have produced evidence that respondent suffered from a bipolar "mood disorder" and was in the throes of an "epileptic seizure" at the time he stabbed to death two men who had interrupted him during a burglary. The state court denied that claim on the merits.

Respondent then filed a federal petition, alleging that same factual basis for his "exhausted" ineffective-counsel claim. But, as the federal case unfolded, respondent largely abandoned—and in any event never proved—the mood-disorder/epilepsy allegations in federal court. Instead, the federal court allowed respondent to produce evidence, from new-found psychiatrists, that respondent really suffered from traumatic brain damage that led him to stab his victims in a rage without realizing he was doing so. Ultimately, the district court concluded that trial counsel was ineffective in failing to investigate and present this evidence.

The Ninth Circuit affirmed, concluding that the California Supreme Court's adjudication of respondent's ineffective-counsel claim was erroneous and "objectively unreasonable" under 28 U.S.C. § 2254(d)(1) in light of evidence produced at the federal hearing—even though respondent had never alleged the underlying facts in state court. The Ninth Circuit never explained why the state court ruling was "unreasonable" in light of the acknowledged fact that counsel had relied on the opinion of the defense psychiatrist that respondent was simply a psychopath suffering from no mitigating mental or

medical disorder or defect—a psychiatrist whom respondent himself presented as an expert in the later federal proceedings, only to hear him testify that, despite the new evidence assembled by habeas corpus counsel, he still adhered to his original diagnosis.

Nor did the Ninth Circuit explain, in connection with another facet of the ineffective-counsel claim, why it was unreasonable for trial counsel to interview respondent and his mother and then present the mother's testimony regarding the circumstances of respondent's upbringing, or why it was doubly unreasonable for the state court to credit counsel's performance as competent in that regard.

Finally, the Ninth Circuit did not explain why the state court erred or acted unreasonably in rejecting respondent's ineffective-counsel claim, given the strong aggravating evidence that respondent had committed two murders and had gloated about his life of violent crime while testifying at the guilt phase of his capital trial.

B. The State Criminal Proceedings

In 1982, respondent stabbed Thomas Johnson and Robert Beckett to death when they interrupted him and his accomplices during a home burglary. He then cleaned the knife and divided with his accomplices the loot: $23 and a quarter-ounce of marijuana. At the guilt phase of his trial on two counts of first-degree capital murder, respondent testified that he was elsewhere at the time of the homicides and asserted that while he had committed "hundreds" of robberies, he only victimized drug dealers, and he only used guns, rather than knives. The jury found him guilty as charged.

At the penalty phase, the prosecution produced evidence that respondent had suffered a prior kidnapping conviction; that he had been involved in gangs as a juvenile; that he had twice resisted arrest and feigned seizures; that he had once broken his wife's jaw; and that, while in prison, he had assaulted inmates, provoked a racial fight, and

threatened to kill a guard and a prosecution witness.

The defense consulted psychiatrist Dr. John Stalberg, who informed trial counsel that respondent showed no signs of brain damage or of mental disorder or defect—other than antisocial personality disorder. Further, Dr. Stalberg reported that, although respondent might have suffered from epilepsy, he had not had a seizure in over a year even though he was not receiving any anti-seizure medication, and that any epilepsy was unrelated to the crime or to respondent's psychopathic personality traits. Finally, Dr. Stalberg told trial counsel that it was "likely [respondent] would be recalcitrant and a security problem while in custody."

Defense counsel decided not to call Dr. Stalberg as a witness. Instead, having interviewed respondent and his mother, the defense called respondent's mother. She testified that, although respondent grew up in a home free of material deprivation, respondent's stepfather disciplined respondent as a child in ways that bordered on abuse. She also described several accidents respondent had as a child and the onset of his epilepsy at age 18. And she described respondent's behavior as a child and a young man as reflecting a lack of respect for authority or the rights of others.

The jury returned a verdict of death. The California Supreme Court affirmed the conviction and sentence on direct review in 1992.

C. The First State Habeas Petition

Respondent then filed a habeas corpus petition in the California Supreme Court claiming that trial counsel had failed to competently investigate and present mitigating evidence at the penalty phase. Respondent also alleged that Dr. Stalberg "perfunctorily, unreasonably and incompetently failed to adequately investigate, recognize, or consider evidence of [respondent's] significant mental health impairments." In support, respondent presented a declaration from Dr. George Woods. Dr. Woods criticized Dr. Stalberg's methodology and

conclusions and offered a new diagnosis: that respondent suffered from a psychotic form of bipolar disorder and that, at the time of his crimes, he was in the throes of an epileptic seizure. Respondent further asserted that defense counsel failed to interview and present testimony from additional family members who, unlike respondent's mother, allegedly would have described respondent's childhood as being marked by deprivation and abuse. Under state procedures calling for the habeas corpus court to provisionally assume the truth of the factual allegations in the petition, the California Supreme Court summarily denied respondent's petition on the merits as failing to make out a *prima facie* case for relief.

D. The First Federal Petition

Respondent next filed a federal habeas corpus petition, again claiming ineffective assistance of counsel in the investigation and presentation of mitigating evidence. Respondent again presented Dr. Woods' diagnosis of bipolar mood disorder and partial complex seizure disorder. He also reiterated his claim that Dr. Stalberg had provided incompetent expert assistance.

In addition, respondent raised a new claim that he had not presented in state court: that trial counsel had incompetently "prepared" Dr. Stalberg. This claim was supported by Dr. Stalberg's declaration that, had he known of new and "voluminous mitigating evidence" regarding respondent's life and family history since given to him by habeas corpus counsel, he would have examined respondent more thoroughly for neurological and physical dysfunction. Dr. Stalberg's declaration, however, offered no diagnosis of respondent different from the one he had offered to trial counsel before the penalty hearing.

Respondent stipulated he had never presented this new allegation to the state court. The federal court stayed the proceedings to give respondent a chance to return to state court and exhaust any state

remedies.

E. The Second State Habeas Petition

So, respondent filed a second state petition, claiming not only that he suffered from bipolar mood disorder and seizure disorder, and that Dr. Stalberg had performed incompetently, but also that trial counsel had performed deficiently in failing to "prepare" Dr. Stalberg. In support of this petition, respondent presented the same declaration of Dr. Stalberg he had presented to the federal court. The California Supreme Court summarily denied this petition on the merits.

F. The Amended Federal Petition

Respondent returned to federal court, amending his petition to present his now-exhausted claim that counsel was ineffective in failing to prepare Dr. Stalberg, supported by the same declaration from Dr. Stalberg—but still offering no new diagnosis of respondent. Respondent moved for an evidentiary hearing. The State argued that no evidentiary hearing was necessary because the California Supreme Court's reasonable adjudication of respondent's claims precluded relief under 28 U.S.C. § 2254(d)(1), and that, in any event, an evidentiary hearing was unauthorized under § 2254(e)(2). Declining to apply AEDPA, the district court granted the evidentiary hearing on respondent's claim that counsel had failed to investigate and present mitigating evidence.

At a deposition just before the evidentiary hearing, however, Dr. Stalberg revealed that nothing in the new material he had reviewed called into question his original diagnosis that respondent was simply a psychopathic criminal. Following this revelation, respondent's lead counsel quit the case, and the Federal Public Defender's Office took over.

Respondent's new lawyers jettisoned Dr. Stalberg and found two new experts, Drs. Sophia Vinogradov and Donald Olson. They came up with

yet another theory regarding respondent's mental state: that respondent's childhood accidents resulted in brain damage leading to "personality change, aggressive type," so that, at the time of the crimes, respondent "flew into a murderous rage" that led him to stab his victims without realizing what he was doing. The State objected—unsuccessfully—that the new experts and their new opinions had no place in federal court because respondent had never presented them in state court.

Reviewing the claim *de novo* under Ninth Circuit authority, the district court granted relief. In the court's view, counsel prejudicially erred in failing to produce both the organic-brain-damage diagnosis and evidence from different family members that respondent had grown up under conditions of deprivation and abuse.

G. The Ninth Circuit Opinions

1. A three-judge panel of the Ninth Circuit reversed. App. 164-253. Applying the AEDPA-amended version of § 2254(d)(1), as required by *Woodford* v. *Garceau*, 538 U.S. 202 (2003), the majority concluded that the California Supreme Court's decision was reasonable because there was no reasonable likelihood that respondent was prejudiced by the omission of the evidence presented at the federal evidentiary hearing. Of particular significance to the prejudice analysis was respondent's smirking and gloating testimony describing his lifelong violent criminality. App. 164-222. Chief Judge Kozinski concurred, also concluding that counsel's performance at the penalty phase was not deficient. App. 222-26. Judge Fisher dissented. App. 226-53

2. The Ninth Circuit granted *en banc* review and affirmed the district court's determination, agreeing in an 8-3 decision that trial counsel had provided ineffective representation at the penalty phase. App. 1-70. The majority first issued a series of rulings on AEDPA procedures. It held that "Congress did not intend to restrict inquiry under §

2254(d)(1) only to evidence introduced in the state habeas court, or to have federal courts imply any such restriction." App. 29. Second, it held that the right to a federal evidentiary hearing is not tied "to a prior determination that the state habeas court unreasonably applied Supreme Court law to the record before it," and that, accordingly, the federal count may consider such evidence even if it has not otherwise concluded that the state habeas court decision involved an unreasonable application of Supreme Court law. App. 30. Third, it held that respondent was entitled under § 2254(e)(2) to present evidence in support of new factual allegations never asserted in state court because he had been denied an "evidentiary hearing" in state court on the same basic claim of "mitigation ineffective assistance . . . ." App. 34. In the Ninth Circuit's view, the federal court properly received and considered evidence in support of factual allegations never made to the state court because the new facts fell within that broadly-stated claim.

On the substantive constitutional claim, the Ninth Circuit treated its interpretation of the 1982 Supplement to the American Bar Association Standards for Criminal Justice as the "prevailing professional norm" for the defense of death penalty cases in Los Angeles in 1984. App. 36-38. Specifically, the Ninth Circuit interpreted the ABA Standards to require counsel to investigate and present evidence "humanizing" the defendant. App. 47, 49, 53-54. Here, that required trial counsel to investigate and present evidence from new experts that respondent had organic brain damage, and evidence from family members other than respondent's mother, who would have testified that respondent's childhood was marked by deprivation and abuse. The Ninth Circuit held that trial counsel failed to meet that standard, notwithstanding that trial counsel investigated respondent's family life and background and consulted with a psychiatrist. The Ninth Circuit concluded that the California Supreme Court's failure to grant relief therefore was unreasonable. App. 68-69.

Chief Judge Kozinski, joined by Judges Rymer and Kleinfeld, dissented. App. 70-163. Chief Judge Kozinski rejected the majority's reliance on new facts presented in federal court as a basis for rejecting under § 2254(d)(1) the California Supreme Court's decision. In the dissent's view, the Ninth Circuit majority had failed to show any deference to the California Supreme Court's resolution of the case. The dissenting opinion set out in detail why the California Supreme Court's resolution of the claim as presented to that court was entirely reasonable. App. 127-62. "It makes no sense to say that a state court unreasonably applied clearly established Supreme Court law to facts it didn't know existed. The state court might well have ruled differently had petitioner presented different facts." App. 79.

The dissenting opinion also concluded that the majority had erred in interpreting the general 1982 ABA standards as articulating a specific standard of care applicable to respondent's case. In this respect, the dissent concluded, the majority's decision was irreconcilable with this Court's recent decisions in *Bobby* v. *Van Hook*, 130 S. Ct. 13, 16-17 (2009) and *Wong* v. *Belmontes*, 130 S. Ct. 383 (2009). App. 88, 98.

REASONS FOR GRANTING THE PETITION

THE NINTH CIRCUIT DECISION UNDERMINES THE CORNERSTONE AEDPA REFORM OF HABEAS CORPUS AND REPRESENTS ANOTHER IN A SERIES OF FAILURES TO DEFER TO REASONABLE STATE-COURT RULINGS

The Ninth Circuit opinion undermines the cornerstone habeas corpus reform of AEDPA: the rule, embodied in 28 U.S.C. § 2254(d), prohibiting relief where the state court's adjudication of the prisoner's federal claim was, if not correct, at least not "objectively unreasonable." Here the Ninth Circuit interpreted § 2254 to again permit, as if in the old pre-AEDPA days of non-deferential review,

federal review of a prisoner's claim as transmogrified by a different factual basis never presented to the state court. In granting relief for alleged ineffective counsel based on facts radically different from those respondent presented to the state court, and different from those alleged as an "exhausted" claim in his federal petition, the Ninth Circuit's interpretation makes deferential review meaningless under § 2254(d). That the Ninth Circuit disregarded a reasonable state-court ruling in a death-penalty case—where a habeas corpus petitioner always can produce some new "mitigating" evidence never presented at trial—illustrates in particular the broad threat the Ninth Circuit decision poses to the "effective death penalty" goal that Congress set in the very title of its reform legislation.

The federal court could have—and should have—disposed of respondent's petition simply and directly, and without an evidentiary hearing that could only skew the analysis, on the basis of the state-court record and adjudication.[2] Because the factual basis for respondent's claim as presented to the California Supreme Court was very weak on both prongs of the ineffective-counsel test, see pp. 21-26, *post*, so that the state court acted reasonably, and indeed correctly, in rejecting it on the merits—§ 2254(d)(1) precluded relief at the threshold. See *Strickland* v. *Washington*, 466 U.S. 668, 687-88, 694 (a claim of ineffective assistance of counsel has two prongs: 1) deficient performance under prevailing professional norms and 2) a reasonable probability of prejudice). In this respect, this case is another in a long and growing line of cases in which the Ninth Circuit has failed to review state court decisions deferentially. This Court has deemed it important to

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[2] In recently granting certiorari in *Richter* v. *Hampton*, No. 09-587, this Court raised on its own the following question: "Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under *Strickland* v. *Washington*, 466 U. S. 668 (1984)?" For the purposes of this case, the State assumes that the deferential standard applies.

correct many such Ninth Circuit errors in the past, and should do so again in this case.

A. The Ninth Circuit's interpretation of AEDPA procedure presents an important question casting doubt on the efficacy of the statutory rule prohibiting relief where the state court's merits adjudication of the petitioner's claim was reasonable.

In enacting AEDPA, Congress restored the primacy of the state courts in determining claims of constitutional error in state criminal trials. *Woodford* v. *Visciotti*, 537 U.S. 19, 27 (2002) (per curiam). Section 2254(d), as amended by AEDPA, provides a limiting comprehensive framework for federal adjudication of collateral attacks on state court judgments. As under pre-AEDPA law, relief is unavailable unless the petitioner first exhausts his state remedies by fairly presenting both the factual and legal bases of his federal claim to the state courts. *Gray* v. *Netherland*, 518 U.S. 152, 162-63 (1996); *Duncan* v. *Henry*, 513 U.S. 364, 365-66 (1995) (per curiam). The state court merits adjudication then becomes the focus of later federal review. *Bell* v. *Cone*, 535 U.S. 685, 694 (2002). Thus, under § 2254(d)(1), federal habeas corpus relief

> *shall not be granted* with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim– [¶] (1) resulted in a decision that was contrary to, or involved the unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

(Emphasis added.) The federal court's opinion of the merits of the claim in the federal petition is not the question. *Woodford* v. *Visciotti*, 537 U.S. at 24-25; *Yarborough* v. *Alvarado*, 541 U.S. 652, 665 (2002).

Rather, "the only question that matters" under § 2254(d) is whether the state court ruling was at least "reasonable" under this Court's clearly-established law. *Lockyer* v. *Andrade*, 538 U.S. 63, 71 (2003).

1. The principal vice of the Ninth Circuit's opinion on AEDPA procedure lies in its erroneous and illogical view that a state adjudication may be deemed "unreasonable" on the basis of new and different factual allegations and evidence never presented in the federal petition and, more importantly, never presented to the state court at all. As the Ninth Circuit mistakenly saw it here, "Congress did not intend to restrict inquiry under § 2254(d)(1) only to evidence introduced in the state habeas court, or to have federal courts imply any such restriction." App. 29. The Ninth Circuit's mistake proceeded from its apparent misapprehension of the determinative question under § 2254(d). In explaining that "the mitigation evidence introduced at the federal evidentiary hearing is properly before us in considering respondent's ineffective assistance claim," App. 35, the Ninth Circuit focused on the evidence produced in the federal evidentiary hearing, rather than on whether the state court adjudication "involved an unreasonable application" of clear law to the claim presented to it.

2. The statutory language, however, dictates that the state adjudication must be reviewed only in light of the facts as presented or alleged in the state court. Section 2254(d)(1) speaks in the past tense to the question of whether the state ruling "involved" an unreasonable application of clear law to the facts or "resulted" in a ruling that "was" contrary to clearly established law. Similarly, § 2254(d)(2) also requires that the state court's determination of the facts offered in support of the claim be reviewed for reasonableness only "in light of the evidence presented at the state court proceeding . . . ." Review of the reasonableness of the state court's application of precedent to the factual basis of a claim likewise must be limited to the factual bases for the claim presented to the state court.

3. The Ninth Circuit's approach is also inconsistent with this Court's pronouncements on § 2254(d). *Holland* v. *Jackson*, 542 U.S. 649, 652 (2004), instructed that, in analyzing a claim under § 2254(d)(1), "whether a state court's decision was unreasonable must be assessed *in light of the record the court had before it.*" (Emphasis added.) The Ninth Circuit somehow took the view that *Holland* permitted it to deem the state court decision "unreasonable" in light of facts and evidence never presented to the state court. App. 30-31. But, as Chief Judge Kozinski noted in dissent, the court of appeals' decision in *Holland* was reversed for doing precisely what the Ninth Circuit did here. As he predicted, "We could be next." App. 82.

In addition, this Court explained in *Williams (Terry)* v. *Taylor*, 529 U.S. 362 (2000), that § 2254(d) review focuses on how a state court "applies" the law "to the facts of a state prisoner's case." *Id.*, at 407-408. That would seem to rule out inquiry into facts the state court never saw. Similarly, *Terry Williams* explained the § 2254(d) inquiry in the past tense as asking "whether the state court's application of clearly established federal law *was* objectively unreasonable." *Id.* at 409 (emphasis added). Further corroborating that the inquiry is a retrospective and contextual one, *Terry Williams* also explained that the § 2254(d) "clearly established Federal law standard," against which state adjudications are measured, refers to Supreme Court holdings "as of the time of the relevant state-court decision." *Id.* at 412. That is, the state ruling is reviewed in the context of the facts and the law that confronted it at the time.

Further, under the procedure discussed in *Williams (Michael)* v. *Taylor*, 529 U.S. 420 (2000), the federal courts are necessarily limited to the facts presented to the state court. Contrary to the Ninth Circuit's interpretation, App. 30, this Court's decision in *Michael Williams* was predicated on the assumption that the § 2254(d)(1) analysis precedes consideration of new evidence that might be developed under § 2254(e)(2). This Court specifically

held that it was "unnecessary to reach the question whether § 2254(e)(2) would permit a hearing" on a claim because the claim failed "on the merits under § 2254(d)(1)." 529 U.S. at 444. And *Michael Williams* refers to the "needless tension" that would ensue if § 2254(e)(2) were to be read as denying a petitioner an evidentiary hearing *after* demonstrating that the state court's determination was unreasonable under § 2254(d)(1): "a prisoner lacking clear and convincing evidence of innocence could be barred from a hearing on the claim even if he could satisfy § 2254(d)." *Id.* at 434. The "tension" to which this Court referred in *Michael Williams*, an which this Court structured the decision in *Michael Williams* to avoid, would not exist if, as the Ninth Circuit has held here, the evidentiary hearing *precedes* examination of the reasonableness of the state court's determination.

4. The Ninth Circuit's interpretation of § 2254(d), condemning the state court for acting "unreasonably" based on evidence withheld from it, also fails as a matter of logic. If facts proved in state court, or assumed to be true by the state court, reasonably support the state court's adjudication under clearly established law, then the state ruling cannot be condemned as "unreasonable" because different facts might have warranted a different result. But the Ninth Circuit condemned it for that reason here.

Under California law, the California Supreme Court consulted the record and provisionally assumed that the well-pleaded factual allegations in respondent's state habeas petition were true. On that basis, the state court denied respondent's ineffective-counsel claim on the merits because the factual allegations did not make out a prima facie case of a constitutional violation. See *People* v. *Duvall*, 886 P.2d 1252, 1258 (Cal. 1995); *In re Clark*, 855 P.2d 729, 741 n.9 (Cal. 1993). Thus, the California Supreme Court adjudicated respondent's claim on its proffered basis: that although trial counsel had been told by Dr. Stalberg that respondent had no mental or medical disability, consultation with another mental health expert

would have produced evidence that respondent suffered from a "mood disorder" and stabbed the two victims in an "epileptic seizure," and that if trial counsel had spoken with other family members, they would have been willing to testify to a version of respondent's life different from that testified to by his mother.

The Ninth Circuit, however, condemned the California Supreme Court's decision as "unreasonable" because different facts alleged and proved in the federal proceedings convinced the federal court that counsel was ineffective for failing to present different evidence: that respondent's organic brain damage plausibly mitigated his culpability by thrusting him into an uncontrollable rage at the time of the crime. As borne out by the Ninth Circuit's emphasis on this alleged organic brain damage, respondent certainly believed that this last theory presented a better case for relief. He serially presented and discarded the different opinions of Dr. Woods and then Dr. Stalberg before, 18 years after trial and nine years after the initiation of habeas corpus proceedings, trumpeting the brand new diagnosis, offered by Drs. Sophia Vinogradov and Donald Olson.

All that mattered to the Ninth Circuit was that, in the end, the new and different factual basis of the claim fit under the broad rubric of a claim denominated as "ineffective counsel" in the state court. The Ninth Circuit's ex post facto holding, that the state court acted "unreasonably" in light of new evidence never disclosed to it, not only encourages the gamesmanship of rotating expert opinions *du jour* but, more important, defeats Congress' demand for deferential review of state judgments. As Chief Judge Kozinski noted in dissent, "I don't believe that AEDPA sanctions this bait-and-switch tactic, nor will it long endure." App. 83-84.

5. The Ninth Circuit, it is true, asserted that respondent was entitled under § 2254(e)(2) to go beyond the state record, and to rely on new and different facts as adduced in the federal evidentiary hearing, because he somehow was not at fault in

failing to develop such facts in support of his claim in the state court. App. 32-34. But, as Chief Judge Kozinski's dissenting opinion makes clear, the (e)(2) excuse does not work here. App. 79-84.

Section 2254(e)(2) provides that the federal court "shall not" hold an evidentiary hearing on a claim "[i]f the applicant has failed to develop the factual basis of the claim in State court proceedings." Here, however, the California Supreme Court gave respondent every opportunity to develop the facts in support of his claims. Policies in place at the time authorized state habeas counsel to expend, without prior approval of the court, up to $3,000 for investigation alone; additional funds for investigation were available if needed. *In re Clark*, 855 P.2d at 751 n.19. Indeed, prior to the filing of the first state habeas corpus petition, respondent hired Dr. Woods, who examined respondent; respondent presented to the state court Dr. Woods' opinion about respondent's mental health, as well as his criticisms of Dr. Stalberg's prior diagnosis. In the second state habeas proceedings, respondent had the services of both Dr. Woods *and* Dr. Stalberg. And, in each instance, the California Supreme Court considered, and rejected, respondent's claims on the merits.

Moreover, as Chief Judge Kozinski recognized, App. 82-83, nothing prevented respondent from returning to the state court after he developed the brand new diagnoses offered by Drs. Vinogradov and Olson. See *In re Robbins*, 959 P.2d 311, 328-30 (Cal. 1998) (a petitioner may return to state court to present claims based upon facts first discovered in federal court if they could not have been discovered previously in the exercise of due diligence).

As a further proffered justification for straying beyond the state-court record, the Ninth Circuit apparently concluded that, before the preclusion on federal evidentiary hearings under § 2254(e)(2) applies, a state court must have granted a petitioner a state evidentiary hearing. App. 32-34. But respondent can hardly complain about the lack of an evidentiary hearing. As explained above, he was provided counsel and investigative assistance that in

fact enabled him to develop a succession of mental-health claims, including the eventual organic brain damage claim that he then declined to present to the state court, before any evidentiary hearing was ever held. Moreover, in provisionally assuming his factual allegations to be true, see *Duvall*, 886 P.2d at 1258, the California Supreme Court considered respondent's claim in a light equal to or better than anything he could have hoped for in an evidentiary hearing, where the State could disprove his allegations by cross-examination and by contrary evidence.

The Ninth Circuit provided no reasoned basis for the proposition that a state evidentiary hearing is a prerequisite to the § 2254(e)(2) bar on federal hearings—and the consequences of its ruling will be profound. Certainly, no language in AEDPA mentions any such requirements. If a petitioner satisfies due diligence under § 2254(e)(2) merely by presenting *any* allegation of fact to the state court, even one that, as here, is inconsistent with the allegation sought to be developed in federal court, then there could be no circumstance in which a petitioner "failed to develop" the facts in state court.

Indeed, the district court's factual findings, relied upon by the Ninth Circuit, are inconsistent with the central factual allegation underlying respondent's claim as presented to the California Supreme Court. The claim presented to the state court was premised on Dr. Woods' diagnoses that respondent suffers from bipolar mood disorder and was having a seizure at the time of the crime. According to the experts credited by the district court and the Ninth Circuit, respondent suffers from organic brain damage. If the district court and Ninth Circuit are right, then Dr. Woods' diagnosis was *wrong*. Thus, following the federal evidentiary hearing, the federal courts should have concluded that the state court rejection of respondent's claim was not only *reasonable*, it was undoubtedly *correct*. Further, contrary to the Ninth Circuit's conclusion, App. 35, it is difficult to envision a more fundamental alteration of a claim than from a claim that

necessarily fails because the underlying allegations of fact are false to one upon which relief is granted based upon the determination that the underlying allegations of fact are true.

6. Conducting an evidentiary hearing before making the § 2254(d) reasonableness determination based only on the state-court record, moreover, creates a risk that the evidence adduced at the hearing will influence the federal court's review of the reasonableness of the state court's resolution. This danger is well-illustrated in this case. The Ninth Circuit found the lure of the new facts so irresistible that it not only considered them in passing on the reasonableness of the state court determination but actually went so far as to articulate a new rule of general application *encouraging* this wasteful and pointless practice.

And a federal evidentiary hearing, particularly in a death penalty case, is an expensive proposition. A 1999 PricewaterhouseCoopers report, commissioned by the Administrative Office of the United States Courts, shows the magnitude of the resources expended in such hearings. The average cost of just an evidentiary hearing to federal courts paying for indigent representation in a California capital case was approximately $113,000 per hearing. "Cost of Private Panel Representation in Federal Capital Habeas Corpus Cases from 1992 to 1998" (Feb. 9, 1999), pp. i, xvi. To this must be added the cost incurred by the State prosecutor's office in defending the warden. Proper application of § 2254(d) before expensive federal discovery and evidentiary-hearing litigation presumably would put a big dent in the average $372,000 in overall costs to the federal district court of a California death-penalty habeas corpus case. See *id.* p. v-51. But the Ninth Circuit opinion here would unnecessarily ratchet up the costs.

7. In implicit recognition that it was at least dubious for it to rely on facts never presented to the state court, the Ninth Circuit asserted in a conclusory way that it would have reached the same result even if the new facts had not been considered.

App. 34-35. This improbable assertion was unsupported by any analysis, and it is irreconcilable with the great weight the Ninth Circuit obviously placed on the new facts in its discussion of respondent's claim of prejudice.

The Ninth Circuit relied on the purported organic brain damage as the central mitigating evidence in its own right, reasoning that the jury might have been convinced that respondent was "physically compelled" to murder his victims, thereby diminishing his moral culpability. App. 52. The Ninth Circuit further concluded that the organic brain damage evidence would also have convinced the jury to discount the profoundly aggravating effect of respondent's guilt-phase testimony. App. 50-54. In the absence of the organic brain damage evidence, no such explanation for respondent's murderous acts would have been available, and the aggravating evidence of respondent's testimony would stand unanswered.

Those two factual points were essential to the Ninth Circuit's determination that the alleged error of counsel in failing to present the organic brain damage evidence was prejudicial. As Chief Judge Kozinski said about the majority's assertion,

> I don't believe the majority does mean it. The majority *must rely heavily on the new experts*, *see*, *e.g.*, maj. op. at 16057, 16082-85, because everything else respondent's lawyers managed to dig up—after sifting through the rubble of his life for close to two decades—is so piddling. It's hardly the stuff that would justify finding the state court unreasonable.

App. 84, emphasis in original.

* * *

Consistent with Congress's intent in enacting AEDPA, as interpreted by this Court, that state courts be the primary forum for litigating the constitutionality of state criminal convictions, the §

2254(d)(1) inquiry must be resolved without reference to facts or legal theories that were not presented to the state courts. Accordingly, consistent with the procedures outlined in *Michael Williams*, in furtherance of the preference for avoiding issues "unnecessary" to the appropriate disposition of the case, and to avoid any improper influence that facts never presented to the state court might exert on the federal court's decision-making under § 2254(d)(1), the § 2254(d)(1) inquiry must be resolved before the federal courts turn their attention to the question of whether an evidentiary hearing is authorized under § 2254(e)(2).

B. The Ninth Circuit opinion erroneously embellished *Strickland* v. *Washington* and represents another in a long line of Ninth Circuit failures to adhere to the deferential review standard set out in AEDPA in this Court's precedents.

As in many other instances in which this Court has intervened in recent years[3], the Ninth Circuit erred here in granting habeas corpus relief in derogation of the strict § 2254(d) limits on federal review. A proper application of § 2254(d)(1) to the state-court adjudication here should have resulted directly in the denial of relief on the basis of the state

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[3]E.g., *McDaniel* v. *Brown*, 130 S. Ct. 665 (2010), *Waddington* v. *Sarausad*, 129 S. Ct. 823 (2009); *Knowles* v. *Mirzayance*, 129 S. Ct. 1411 (2009); *Uttecht* v. *Brown*, 551 U.S. 1 (2007); *Schriro* v. *Landrigan*, 550 U.S. 465 (2007); *Carey* v. *Musladin*, 549 U.S. 70 (2006); *Rice* v. *Collins*, 546 U.S. 333 (2006); *Kane* v. *Garcia-Espitia*, 546 U.S. 9 (2005) (per curiam); *Brown* v *Payton*, 544 U.S. 133 (2005); *Yarborough* v. *Alvarado*, 541 U.S. 652; *Middleton* v. *McNeil*, 541 U.S. 433 (2004) (per curiam); *Yarborough* v. *Gentry*, 540 U.S. 1, 8 (2003) (per curiam); *Lockyer* v. *Andrade*, 538 U.S. 63; *Woodford* v. *Visciotti*, 537 U.S. 19; *Early* v. *Packer*, 537 U.S. 4 (2002) (per curiam).

court record, without any federal evidentiary hearing.

1. The state court's rejection of the ineffective-counsel claim was reasonable because, for example, it was uncontested that defense psychiatrist Dr. Stalberg had examined respondent and had reported to trial counsel that respondent was a psychopath with no mental or medical disabilities relating to the commission of the crime, and who would likely be a security problem while in custody. The California Supreme Court, moreover, was not required to accept the notion that Dr. Woods' improbable explanation—that respondent had stabbed two people to death while committing burglary in the midst of an epileptic seizure—undermined confidence in the jury's verdict. Respondent, indeed, discarded that notion in federal court.

While respondent complained that counsel had failed to "prepare" Dr. Stalberg, nothing in *Strickland* clearly required the state court to accept that any such duty devolves upon counsel, rather than upon the psychiatrist whose expertise is sought precisely because lawyers are not medical experts. Indeed, even the Ninth Circuit at the time had ruled that, absent some complaint by the retained mental health expert about the sufficiency of the information to support a well-founded opinion, trial counsel had no duty to seek out and provide additional information to the expert. *Hendricks* v. *Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995). Here, even in his post-conviction declaration, Dr. Stalberg never said that the opinion he expressed to trial counsel had changed in light of the new material he had reviewed during the habeas corpus process. Thus, the California Supreme Court confronted a proffered record showing that, even if counsel had undertaken the additional investigation, the retained expert would not have offered a different opinion more useful to the defense.

And, in fact, Dr. Stalberg admitted as much at the evidentiary hearing. Dr. Stalberg could not have been clearer: "the additional materials I reviewed did not alter my conclusions that Mr. Pinholster suffers

from Antisocial Personality Disorder, as the term is defined in the DSM-III." (3ER 793.)

Further, respondent's unexplained—and inexplicable—delay in presenting his organic brain damage allegation logically precludes the district court's and Ninth Circuit's conclusion that any reasonably competent lawyer would have investigated, discovered, and presented organic brain damage evidence to the jury at the time of respondent's trial in 1984. Respondent presented his first habeas corpus petition to the state court in 1993; then, in 1997, he presented a petition to the federal district court; then another petition to the state court; and finally an amended petition to the federal court. In none of those petitions did respondent allege that he suffers from organic brain damage.

It was not until 18 years after his trial, on the eve of respondent's federal evidentiary hearing, that the possibility that respondent had organic brain damage was first mentioned. How trial counsel, in the heat of trial, could have discovered a diagnosis that it took post-conviction counsel 18 years to discover, is not readily apparent, and is nowhere explained. On the contrary, as Chief Judge Kozinski recognized, "[t]he 18 year delay in presenting the diagnosis of 'organic personality syndrome' must either mean that habeas counsel was not diligent or trial counsel was not ineffective. There's no escape." App. 80-81.

2. The state court's rejection of the *Strickland* claim was at least "objectively reasonable" when evaluated in the broader context of, not just trial counsel's reliance on Dr. Stalberg's expert opinion, but counsel's investigation of respondent's family background. Here, counsel interviewed respondent and his mother, who offered similar accounts of a relatively benign upbringing (though one not entirely free from strife) in which respondent elected to engage in antisocial behavior. And he presented the testimony of respondent's mother regarding the circumstance of respondent's childhood. This is precisely the kind of "humanizing" evidence that the Ninth Circuit criticized counsel for failing to adduce.

The reasonableness of the state court adjudication in this regard is illustrated by a comparison to the facts in *Strickland* itself. There, trial counsel

> spoke with respondent about his background. He also spoke on the telephone with respondent's wife and mother, though he did not follow up on the one unsuccessful effort to meet with them. He did not otherwise seek out character witnesses for respondent. App. to Pet. for Cert. A265. Nor did he request a psychiatric examination, since his conversations with his client gave no indication that respondent had psychological problems. *Id.*, at A266. [¶] Counsel decided not to present and hence not to look further for evidence concerning respondent's character and emotional state.

Strickland v. *Washington*, 466 U.S. at 673. Based on these efforts, this Court concluded that "the conduct of respondent's counsel at and before respondent's sentencing proceeding cannot be found unreasonable." *Id.* at 698. Here, of course, trial counsel did more: he actually called respondent's mother to the stand, and he had respondent examined by a psychiatrist. If *Strickland*—decided on May 14, 1984, one week to the day after the verdicts were rendered in respondent's case—articulates the standard of care applicable to respondent's trial attorneys, the state court's ruling should be accepted as not just reasonable, but correct.

3. Further, nothing required the state court to minimize the aggravating effect of respondent's guilt-phase testimony on any potential penalty-phase defense—as the Ninth Circuit did in reducing it to two sentences compared to the over three pages the Ninth Circuit spends discussing respondent's alleged organic brain damage. Compare App. 48 (discussing respondent's guilt-phase testimony) with App. 50-54 (discussing organic brain damage). As the majority

opinion from the original three-judge panel noted,

> Pinholster's violent past—a past Pinholster proudly boasted about to the jury—offsets the mitigating evidence. Pinholster bragged that he had committed hundreds of armed robberies within a three-year time period. In addition, he admitted to a prior kidnaping, during which he held a knife to the victim's throat. And, unlike the petitioner in *Williams*, Pinholster neither expressed remorse over the murders of Thomas Johnson and Robert Beckett, nor attempted to aid the police in their investigation. Rather, Pinholster threatened to kill the State's lead witness, Art Corona, and proudly recounted his recusant behavior in front of the jury.

App. 217. The devastating effect of respondent's guilt-phase testimony on the penalty phase was also evident to dissenting Judge Fisher, who purported to find a constitutional violation in the decision to "allow" respondent to testify in such a damaging way at the guilt phase. App. 227-32. Given his own testimony, it was not "objectively unreasonable" under *Strickland* to conclude that respondent was not prejudiced by any alleged deficiency of counsel. See *Smith* v. *Spisak*, 130 S. Ct. 676, 687-88 (2010) (this Court concluded that the defendant was not prejudiced by the purported ineffective assistance of counsel based, in part, on the defendant's "boastful" testimony regarding his life of crime).

4. In erroneously rejecting the state court ruling, the Ninth Circuit treated the generalized 1982 ABA Standards as defining the prevailing professional norm governing a capital-case mitigation defense in California in 1984. See *Bobby* v. *Van Hook*, 130 S. Ct. at, 16-17. As Chief Judge Kozinski recognized, however, the more crucial mistake was relying on those standards to erect a constitutional rule that compels capital-case counsel to present, not just "humanizing evidence," see App. 86, but a specific *kind* of humanizing evidence: that the

defendant had a bad childhood. The Ninth Circuit's rule is precisely the sort of "rigid" and hindsight ineffective-counsel rule that this Court has condemned. See *Yarborough* v. *Gentry*, 540 U.S. at 8; *Strickland* v. *Washington*, 466 U.S. at 688-89.

The chief judge aptly noted that the earlier Ninth Circuit case of *Belmontes* v. *Ayers*, 529 F.3d 834 (9th Cir. 2008), had similarly imposed such rule only to have this Court step in and reject it. See *Wong* v. *Belmontes*, 130 S. Ct. 383.) He lamented, "That *Belmontes* was unanimously–and unceremoniously–reversed seems to have made no impression around here." App. 88. He also might have noted that this Court, in *Knowles* v. *Mirzayance*, 129 S. Ct. at 1419, rejected a similar attempt by the Ninth Circuit to engraft on *Strickland* a rigid corollary requiring lawyers to pursue tactics when there is "nothing to lose." See also *Richter* v. *Hickman*, cert. granted (No. 09-587) (whether *Strickland* requires counsel to meet scientific evidence with contrary expert opinion).

Under the Ninth Circuit's rule, trial counsel should have disregarded what respondent told them, what respondent's mother told them, and what their psychiatric expert told them, and continued to dig into respondent's past. But that is contrary to this Court's teaching that trial counsel is entitled to make a reasonable decision to curtail additional investigation depending upon what the initial investigation reveals. *Burger* v. *Kemp*, 483 U.S. 776, 795 (1987). To survive "reasonableness" review under § 2254(d), the California Supreme Court ruling hardly needed to conform to the Ninth Circuit's idiosyncratic view of the obligations purportedly imposed on respondent's trial counsel by the generalized 1982 ABA Standards.

In the end, the Ninth Circuit's decision here is inconsistent with its determination in *Hendricks* that counsel ordinarily has no obligation to determine what information an expert might need to form an opinion. 70 F.3d at 1038. And it relied on generalized ABA standards to deduce a rigid rule requiring counsel to "humanize" capital defendants

with evidence of a bad childhood. As Chief Judge Kozinski's dissent put it, "This is *Van Hook* on stilts." App. 98.

* * *

The Ninth Circuit once again has disregarded the limitations on federal collateral relief codified in § 2254(d)(1). And it improperly ratified, in derogation of § 2254(e)(2), the decision of the district court to take evidence on factual allegations that could have been presented to the state court, but were not. The Ninth Circuit's decision is wrong on the law, wrong on the facts, and creates a new legal paradigm that will place a substantial burden on the states to defend criminal convictions against baseless attacks. It warrants either summary or plenary review and reversal by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: March 9, 2010

Respectfully submitted

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APPENDIX

Supreme Court, U.S.
FILED

No. 09-1088 MAR 9 - 2010

OFFICE OF THE CLERK

In the Supreme Court of the United States

VINCENT CULLEN, ACTING WARDEN OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN, *Petitioner,*

v.

SCOTT LYNN PINHOLSTER, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

United States Court of Appeals,
Ninth Circuit.

Scott Lynn Pinholster, Petitioner-Appellee,
v.
Robert L. Ayers, Jr., Warden, Respondent-Appellant.

Scott Lynn Pinholster, Petitioner-Appellant,
v.
Jeanne S. Woodford, of the California State Prison at San Quentin, Respondent-Appellee.

Nos. 03-99003, 03-99008.

Argued and Submitted June 23, 2009.

Filed Dec. 9, 2009.

James William Bilderback II, Supervising Deputy Attorney General, argued, Kristofer Jorstad, Deputy Attorney General, Los Angeles, CA, for the respondent-appellant, cross-appellee.

Sean K. Kennedy, Federal Public Defender, Los Angeles, CA, for the petitioner-cross appellant/appellee.

Appeal from the United States District Court for the Central District of California, Gary L. Taylor, District Judge, Presiding. D.C. No. CV-95-06240-GLT.

Before: ALEX KOZINSKI, Chief Judge, HARRY PREGERSON, STEPHEN REINHARDT, PAMELA ANN RYMER, ANDREW J. KLEINFELD, KIM McLANE WARDLAW, W. FLETCHER, RICHARD A. PAEZ, MARSHA S. BERZON, JAY S. BYBEE, and MILAN D. SMITH, JR., Circuit Judges.

Opinion by Judge MILAN D. SMITH, JR.; Dissent by Chief Judge KOZINSKI.

MILAN D. SMITH, JR., Circuit Judge:

Scott Lynn Pinholster (Pinholster) was sentenced to death after a jury convicted him of double murder with a knife in the course of a home robbery and burglary. After exhausting his state remedies, Pinholster sought a writ of habeas corpus in federal district court in which he alleged, among other claims, ineffective assistance of counsel at both the guilt and penalty phases of his trial. Applying the standards of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214, in its final ruling, the district court upheld Pinholster's conviction, but granted habeas relief on his death sentence because the court found that trial counsel's deficient performance at the penalty phase of the trial unconstitutionally prejudiced Pinholster's defense.

A three-judge panel of this court affirmed the district court's guilt phase determination but

reversed its grant of habeas relief on the penalty phase. *Pinholster v. Ayers* (*Pinholster II*), 525 F.3d 742 (9th Cir.2008). Sitting en banc, we affirm the district court. Although the denial of Pinholster's guilt phase ineffective assistance claim was appropriate, his penalty phase ineffective assistance claim warrants habeas relief even when considered under AEDPA's deferential standards.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

A. The Prosecution's Guilt Phase Case

As recounted in the California Supreme Court's opinion on direct appeal, Art Corona (Corona), an accomplice in the commission of most of the crimes charged, served as the prosecution's primary witness. *Pinholster v. Ayers* (*Pinholster I*), 1 Cal.4th 865, 4 Cal.Rptr.2d 765, 824 P.2d 571, 582 (1992). At trial, Corona testified that he, Pinholster, and Pinholster's co-defendant, David Brown (Brown), were attending a party at Pinholster's apartment on the evening of January 8, 1982, when Pinholster solicited them to rob Michael Kumar, a local drug dealer. *Id.* Pinholster told the others that he anticipated forcing entry into Kumar's home and taking drugs and money. *Id.*

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[1] The California Supreme Court's opinion in *People v. Pinholster* (*Pinholster I*), 1 Cal.4th 865, 4 Cal.Rptr.2d 765, 824 P.2d 571, 581-87 (1992), and our three-judge panel's majority opinion in *Pinholster v. Ayers* (*Pinholster II*), 525 F.3d 742, 749-56 (9th Cir.2008), thoroughly summarize the detailed facts in this case. With independent verification, we reiterate here only those facts material to our disposition.

As Corona drove towards Kumar's house, Pinholster directed Corona to stop at Lisa Tapar's residence. *Id.* Pinholster wanted Tapar to help with the robbery, but when he knocked on her door, she refused him entry and shut the door in his face. *Id.* In response, Pinholster took a buck knife from his belt, stabbed it through the door, and scratched a swastika and thunderbolts into the hood of her car. *Id.* Tapar, her father, and a third witness corroborated Corona's description of this incident. *Id.*

When Pinholster, Brown, and Corona arrived at Kumar's residence and found no one home, they broke in and ransacked it, taking a small amount of marijuana from a bedroom and spilling a green substance in the kitchen. *Id.* at 582-83. While they were searching the house, they heard a car pull up and saw Thomas Johnson and Robert Beckett (Kumar's housesitters) approach, one of whom opened the front door and shouted that he would call the police. *Id.* at 583. Pinholster, Brown, and Corona all moved towards the rear door to leave, but Johnson and Beckett came to the back and blocked their way. *Id.* When Johnson tried to enter the house, Pinholster struck him in the chest three or four times, demanding drugs and money. *Id.* Johnson dropped his wallet on the ground and obeyed Pinholster's order to sit down. *Id.* Pinholster then attacked Beckett as he approached, stabbing him in the chest. *Id.* Beckett dropped to the ground, and Pinholster kicked him in the head repeatedly, took the wallet from Beckett's pocket, and also picked up Johnson's wallet. *Id.* Brown then stabbed Johnson in the chest, "bury[ing] his knife to the hilt." *Id.* Johnson and Beckett died of their wounds.

Pinholster, Brown, and Corona then left Kumar's house and drove back to Pinholster's apartment. *Id.* On the way, Brown and Pinholster commented that they had "gotten them good." *Id.* Pinholster washed his knife upon his return, and the three split the proceeds of the robbery: $23 and a quarter-ounce of marijuana. *Id.*

Although Pinholster called Corona the day after the crime and told him to "lie low," Corona turned himself in two weeks later and gave a statement to police. *Id.* According to Corona, Pinholster threatened to blow him up on his way to court if Corona refused to invoke his right against self-incrimination, and testified against him. *Id.* Nevertheless, Corona testified against Pinholster and Brown and, at the end of the trial, pleaded guilty to burglary. *Id.*

Corona's wife, Casey Corona, who was at Pinholster's apartment when Pinholster, Brown, and her husband returned from Kumar's residence, corroborated her husband's testimony about the initiation, execution, and aftermath of the crime. *Id.* She testified that she watched Pinholster wash blood from his knife, and that she heard him say, "It had to be done the way it was done. We had to do what we had to do." *Id.*

The prosecution also presented forensic evidence that Pinholster had been in Kumar's home after the ransacking. *Id.* According to Corona's testimony, Pinholster wore boots and jeans on the evening of the murders. *Id.* During their search of Pinholster's apartment, police discovered boots, a towel, and a pair of jeans, all with microscopic blood

traces on them. *Id.* While the boots and the towel tested positive for human blood, the jeans were not tested to determine whether the blood on them was also human. *Id.* at 583-84. Additionally, when police arrested Brown, he was carrying a buck knife with human blood traces close to the hilt and with dimensions that matched a stab wound in Johnson's body. *Id.* at 584. Police also discovered human blood on the inside forearm of Corona's shirt sleeve, but did not find any blood on his knife. *Id.*

B. Pinholster's Guilt Phase Case

During the guilt phase of his trial, Pinholster testified on his own behalf and presented an alibi defense. *Id.* at 584-85. He boasted that he had committed hundreds of robberies over the previous six years, using a gun, but never a knife, to victimize drug dealers. *Id.* at 584. Although he admitted a prior kidnapping conviction with the use of a knife, he claimed that he pleaded to the aggravating circumstance only as part of a plea bargain. *Id.* Pinholster also admitted going to Kumar's house and taking marijuana from the bedroom, but denied ransacking the residence or killing anyone. *Id.* Pinholster asserted that Corona had asked him for Kumar's address that night, and that Corona had gone to Kumar's house later to steal some additional drugs and money. *Id.* at 585.

C. The Jury's Guilt Phase Verdict

At the close of the guilt phase, the jury convicted Pinholster of first-degree murder and found that the following two multiple-murder special-circumstance allegations were true, making him

eligible for a death sentence: first, he committed each murder during the course of a robbery and a burglary; and second, he personally used a knife. *Id.* at 581. The jury also convicted him of burglary, robbery, and intentional infliction of great bodily injury through personal use of a knife. *Id.*

D. The Prosecution's Penalty Phase Case

At the penalty phase of the trial, Pinholster stipulated that he had a prior kidnapping conviction with the use of a knife, and that he was identified as having held the knife to the victim's throat. *Id.* at 586. Pinholster also stipulated to numerous disciplinary infractions during his prison term for the kidnapping, such as throwing urine at guards, threatening to stab guards, and threatening to throw guards from an upper tier of the prison. *Id.* The prosecution presented testimony that Pinholster had a violent history with law enforcement, including: an outburst in court as a juvenile during which he threatened everyone in the room and struck a bailiff; resisting arrest as an adult by kicking one police officer in the back of the head while allegedly faking an epileptic seizure; making threats and kicking the X-ray machine when taken to the hospital after his arrest; starting a racial fight while in custody and kneeing an officer in the groin; and various other incidents of violence or threats of future violence while in custody, including death threats. *Id.* In addition, the prosecution presented testimony that Pinholster was a well-known member of the juvenile gang community. Theodore Mesquita testified that Pinholster had once cut Mesquita's arm with a razor, afterwards pursuing him on foot to the hospital where Mesquita required fifty stitches to close his

wound. *Id.* at 586-87. Cathy Ann Smith, Pinholster's ex-wife, also testified that Pinholster once broke her jaw while seeming to have an epileptic seizure. *Id.* at 587.

E. Pinholster's Penalty Phase Case

Pinholster had been represented by, and later rejected, several different court-appointed attorneys to represent him in this case before he petitioned the court to permit him to represent himself, which he did from March 17 to July 13, 1983. *Pinholster II*, 525 F.3d at 751 n. 5. Pinholster later reconsidered, however, and the Los Angeles County Superior Court appointed Harry W. Brainard and Wilbur G. Dettmar to represent him during the guilt and penalty phases of his trial. *Id.*

On March 22, 1983, the State mailed a letter to Pinholster at the Los Angeles County Jail, informing him that the prosecution planned to offer aggravating evidence at the penalty phase. *Id.* at 751. When the guilt phase ended on April 24, 1984, Pinholster's counsel moved to exclude the aggravating evidence on the ground that the prosecution had failed to provide reasonable notification under California Penal Code § 190.3. *Id.* The state trial court denied the motion, concluding that Pinholster had received actual notice of the State's intention to seek the death penalty during the time period in which he represented himself. *Id.* at 751, 751 n. 6. In doing so, however, the court advised defense counsel that it would grant a defense motion to continue the penalty phase of the trial to allow Pinholster's counsel to prepare a mitigation case. *Id.* at 751. Pinholster's counsel declined the offer, stating

that they did not believe that more time "would make a great deal of difference."

Pinholster's counsel had earlier consulted with Dr. John M. Stalberg, a psychiatrist, who examined Pinholster on March 11, 1984, about a week after the guilt phase of the trial began. Dr. Stalberg had received a copy of Pinholster's police reports as well as a copy of his 1978 probation report, and examined Pinholster himself for one to two hours. He concluded that Pinholster "did not manifest any significant signs or symptoms of mental disorder or defect other than his antisocial personality disorder by history." Based on his examination, Dr. Stalberg opined that Pinholster was cognitively functional, without brain damage, and noted that while Pinholster allegedly had epilepsy, he had not had a seizure for the past year and was not on medication. Pinholster's trial counsel did not contact Dr. Stalberg again, nor did they consult with any other mental health expert.

Pinholster's counsel billed a total of only 6.5 hours in preparation for the penalty phase of the trial.[2] Brainard stated that while "Mr. Dettmar was

[2] The record shows that counsel billed 1.5 hours to "[s]tart prep. for penalty phase" on April 11, 1984, 3.0 hours for "[p]rep. penalty phase and conf. with Mrs. Brashear" on April 25, 1984, and 2.0 hours for "[p]rep. penalty phase" on April 26, 1984. The dissent guesses that other records which do not mention penalty phase preparation might be penalty preparation in disguise (or, worse, that "perhaps[counsel] was not diligent about time records."). Diss. at 697. Despite our dissenting colleague's well-known flair for "creative" writing, it is not appropriate for a federal appellate court to conjure up evidence that does not exist, especially

(continued...)

primarily responsible for psychiatric, psychological, and other mental health issues in the case," he had "no recollection of Mr. Dettmar having secured or reviewed any of [Pinholster's] medical records, nor did [Brainard] see any [of them]." "So far as[Brainard] recollect[ed], neither Mr. Dettmer nor [Brainard] interviewed any of Scott's previous medical providers" even though they were "aware prior to trial that Dr. Dubin and other health care providers had treated Mr. Pinholster for seizure disorder." In the same vein, Brainard admitted:

> I do not recall interviewing or attempting to interview [Pinholster's] family members or any other persons regarding penalty phase testimony, except Mrs. Brashears [sic], defendant's mother. I have no recollection of seeing or attempting to secure [Pinholster's] school records, juvenile records, medical records, or records of prior placements. I have no recollection of interviewing or attempting to interview [Pinholster's] former teachers, counselors, or juvenile officers.

The limited preparation that was done included interviewing Pinholster's mother, Burnice Brashear (Brashear), who later became the sole defense witness called at the proceeding. Brashear testified that Pinholster had been in several

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(...continued)
when we have counsel's own testimony that they did not anticipate a death penalty hearing, and thus did not prepare for it. *See Pinholster II*, 525 F.3d at 751.

accidents as a small child. When Pinholster was two years old, Brashear accidentally ran over him with her car, badly injuring his head. When Pinholster was four or five, Brashear was involved in a car accident in which Pinholster's head went through the windshield. Brashear also testified that Pinholster did not get along well with his step-father, who was a strict disciplinarian to the point of abuse at times. She stated that Pinholster was disruptive in the classroom as a child, but "did much better" when sent to an academically handicapped class in third or fourth grade.

Brashear further testified that when Pinholster was about ten, she took him to a psychiatrist who recommended that he be placed in a mental institution. She rejected that recommendation because she "didn't think he was that far gone." Meanwhile, Pinholster began stealing things and playing "Robin Hood" around the neighborhood, which indicated to her that "something was not working right." Pinholster eventually was sent to juvenile hall as a result of these thefts. As an adult, Pinholster had physical problems that included epilepsy, which Brashear understood to be the result of his being "beaten up pretty severely in jail" when he was eighteen. She also stated that he was on medication for that epilepsy, but that she did not know if he received the recommended medication while in prison.

Brashear then testified that her other children were "basically very good children," although they had also been in trouble with the law. She specifically mentioned DUI charges for both her younger son and her "wild girl" daughter. Brashear

emphasized, however, that her other children were not like Pinholster, who was a "show-off" and had been in and out of mental institutions from the time he was twelve. She stated that the doctors had found "something wrong here outside of just bad behavior." Brashear also testified that Pinholster "never really wanted for anything at home too much," having had "everything normally materialwise that most people have," and that although the family "didn't have lots of money," he always had "a roof over his head" and "decent clothes." Finally, she indicated that although Pinholster was "a perfect gentleman" at home, his long stay in state prison had affected him so that it was difficult for him to remember that he could open doors and walk outside.

F. The Jury's Penalty Phase Verdict and the State Trial Court's Sentencing of Pinholster

Following Brashear's testimony and two and a half days of deliberation, the jury returned a death verdict on each of the two murder counts on May 7, 1984, *Pinholster II*, 525 F.3d at 751-52, and the state trial court sentenced Pinholster accordingly.

G. The State Habeas Petition

After the California Supreme Court set aside one multiple-murder special circumstance but otherwise affirmed the judgment on direct appeal, Pinholster filed a state habeas petition in which he alleged, among other claims, ineffective assistance of counsel at both the guilt and penalty phases of his trial.

In support of his guilt phase ineffective

assistance claim, he presented evidence that his counsel had failed to test the forensic evidence independently and to move to exclude prior bad acts evidence introduced by the prosecution. Pinholster also presented evidence that his counsel were ineffective during the penalty phase by failing to conduct an adequate investigation into his mental health. Specifically, he claimed that Dr. Stalberg, the expert consulted by his attorneys, had "unreasonably, incompetently and perfunctorily arrived at unsupported conclusions based upon inadequate investigation and analysis." He also presented the testimony of Dr. George Woods, who also condemned Dr. Stalberg's report and offered an alternative analysis. Dr. Woods indicated that Pinholster suffered from bipolar disorder, and that at the time of the murders, Pinholster was in the throes of an epilepsy-related seizure. Dr. Woods also opined that Pinholster was incompetent to stand trial.

The California Supreme Court issued an order to show cause on the penalty phase ineffective assistance claim, but then vacated the order as improvidently granted and denied the petition "on the substantive ground that it is without merit."

II. The Federal Habeas Petition

Pinholster filed a federal habeas petition on April 22, 1997. In this petition, Pinholster abandoned use of Dr. Woods's testimony and instead presented the testimony of Dr. Stalberg, who stated that if trial counsel had provided him with Pinholster's family history, particularly as related to medical disorders, he would have made further inquiry "before concluding that [Pinholster] had merely a personality

disorder." After the parties stipulated that the petition included new material facts and unexhausted claims, the district court dismissed the unexhausted claims and held the fully exhausted petition in abeyance.

The California Supreme Court denied Pinholster's second state habeas petition "on the substantive ground that it is without merit."[3]

The case then returned to federal district court, where Pinholster requested an evidentiary hearing. *Pinholster II*, 525 F.3d at 754. Applying pre-AEDPA law, the court denied an evidentiary hearing and granted summary judgment to the State on Pinholster's guilt phase ineffective assistance claims, *id.* at 748, 754 n. 9, 756, but granted an evidentiary

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[3] The dissent seems mesmerized by the fact that the California Supreme Court twice denied Pinholster's state habeas petitions. Diss. at 684-85, 688-89, 707-09. It is true that the postcard denial, issued by the same justices who had previously denied Pinholster's petition, was technically a second look. However, contrary to the dissent's suggestion, the level of deference is not measured by the number of times that habeas relief has been denied. If that were the case, then the Supreme Court might have exercised greater deference in *Porter*, *Wiggins*, and *Rompilla*, where their respective state trial and supreme courts had both denied postconviction relief. Instead, the Court granted habeas relief anyway, because collateral habeas review is not concerned with the number of times the state did or did not grant relief. *See Porter v. McCollum*, 558 U.S. ----, 130 S.Ct. 447, --- L.Ed.2d ---- (2009) (per curiam); *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005).

hearing on Pinholster's penalty phase ineffective assistance claim, *id.* at 754. Pinholster prepared a declaration by Dr. Stalberg to serve as direct testimony for that hearing. During Dr. Stalberg's subsequent deposition, however, he testified that nothing in the information compiled by the defense team altered his basic opinion that Pinholster "suffers from Antisocial Personality Disorder." Defense counsel then dropped Dr. Stalberg from the case and substituted two new experts, Dr. Donald Olson and Dr. Sophia Vinogradov. *Pinholster II*, 525 F.3d at 755.

At the evidentiary hearing, as discussed in further detail in section III.B.3.b. of this opinion, Pinholster presented mitigation evidence that his counsel had failed to present at the penalty phase of his trial. This evidence included testimony that his childhood upbringing was much worse than his mother had described. His biological father was an unemployed drunk who was unfaithful to his mother, and the couple divorced shortly after Pinholster's birth. His father had mood swings and fits of anger, and was eventually diagnosed as paranoid with narcissistic personality disorder. After his parents' divorce, Pinholster's mother generally did not have enough money to provide for the children and, when she had money, usually spent it on herself. Pinholster's grandmother, who often watched the children while his mother worked, used to "beat the hell out of" him because he resembled his father.

Pinholster's step-father came into his life when Pinholster was five years old, and was, according to Pinholster's evidence, more than simply a strict disciplinarian. The step-father beat the children with

his fists, a belt, and-on at least one occasion-a two-by-four board. Otherwise, he was "completely indifferent" to them. The additional evidence also showed that the family did not get enough to eat and lived in crime-ridden neighborhoods, and that the children ran wild, frequently trashed apartments, and lacked any moral or other discipline.

Regarding his schooling, Pinholster presented testimony that he was a nice and intelligent child, but restless and hyperactive, unable to sit still and in need of a great deal of attention. Although his fourth-grade teacher arranged several appointments with his mother to discuss the situation, his mother generally failed to attend or, if she did attend, remained non-responsive throughout the appointment. After Pinholster had been arrested three different times when he was ten or eleven years old, the juvenile court placed him in a home for emotionally disturbed boys, after which he stayed at a state mental hospital for about five months. Although the psychiatric discharge report recommended his placement in a good foster home, that suggestion went unheeded. In seventh grade, Pinholster began using drugs, including marijuana, barbiturates, alcohol, acid, and cocaine. He became addicted to heroin while in the eighth grade. Thereafter, he was sent to juvenile hall at least nine times and to at least three schools for troubled boys, and was finally sent to prison at age nineteen following a conviction for kidnapping.

Pinholster also provided further details of his family's criminal and mental history. His older brother, Alvin, was charged with the rape and sodomy of a fourteen-year-old, and was later

diagnosed with schizophrenia and found to be incompetent to stand trial. Shortly after Pinholster's parole from his kidnapping sentence, Alvin committed suicide. Pinholster's younger brother, Terry, was diagnosed with mild depression and abused drugs, and his half-sister, Tammy, began drinking alcohol when she was eleven. When Tammy was seventeen, she was arrested with her boyfriend for sexually assaulting a fourteen-year-old girl. Guy, a half-brother, was diagnosed with manic depression, and Gary, another half-brother, was an alcoholic with severe mood swings.

Pinholster's experts also testified that he had suffered brain damage that explained his aggressive, impulsive, and antisocial behavior. Dr. Olson, a pediatric neurologist, concluded that Pinholster sustained frontal-lobe injuries from the two childhood car accidents, as evidenced by the facts that Pinholster suffered from epilepsy and that he had an abnormal electroencephalogram (EEG) when he was nine years old. Dr. Vinogradov, a psychiatrist, diagnosed Pinholster with organic personality disorder brought on by childhood and later-life head trauma, and ruled out a diagnosis of antisocial personality disorder.

In light of this evidence, and applying pre-AEDPA law, the district court granted Pinholster's habeas petition based on the "inadequacy of defense counsel in investigating and presenting mitigation evidence at the penalty phase" of his trial. The same day the district court filed its decision, however, the Supreme Court issued its opinion in *Woodford v. Garceau*, which held that AEDPA applies in capital habeas cases so long as the petition was filed after

April 24, 1996. 538 U.S. 202, 207, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003). In response, the district court issued an addendum to its order, concluding that Pinholster timely filed his federal habeas petition; that Pinholster was entitled to an evidentiary hearing under AEDPA; and that AEDPA did not affect the grant of habeas relief because "[t]he California Supreme Court did not adjudicate Pinholster's claim that counsel was ineffective for failing to investigate and present mitigating evidence at the penalty phase." The parties cross-appealed, and a three-judge panel of our court affirmed the district court's guilt phase ineffective assistance determination, but reversed its grant of habeas relief on the penalty phase ineffective assistance claim. *Pinholster II*, 625 F.3d at 773. Upon the affirmative vote of a majority of the eligible judges in our court, we took the case en banc.

II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 2253. We review a district court's decision to grant or deny a writ of habeas corpus de novo, *Lewis v. Mayle*, 391 F.3d 989, 995 (9th Cir.2004), and the district court's findings of fact for clear error, *Bonin v. Calderon*, 59 F.3d 815, 823 (9th Cir.1995). Because Pinholster filed his federal habeas petition in 1997, the provisions of AEDPA govern his claims. *See Penry v. Johnson*, 532 U.S. 782, 792, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001).

AEDPA provides that a petitioner is not entitled to habeas relief on any claim "adjudicated on the merits" by the state court unless that

adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The relevant state court decision is the last reasoned decision regarding a claim, *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir.2005), and "the phrase '[adjudicated] on the merits' requires that the [state court's] grant or denial rest on substantive, rather than procedural, grounds," *Lambert v. Blodgett*, 393 F.3d 943, 966 (9th Cir.2004) (reading in pari materia with 28 U.S.C. § 2254(d)).

"Clearly established" federal law consists of holdings of the Supreme Court at the time the petitioner's state court conviction became final. *Terry Williams v. Taylor*, 529 U.S. 362, 379-84, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Habeas relief is unavailable if the Supreme Court has not "broken sufficient legal ground" on a constitutional principle advanced by a petitioner, even if lower federal courts have decided the issue. *Id.* at 381, 120 S.Ct. 1495. Nevertheless, while only Supreme Court authority is binding, circuit court precedent may be "persuasive" in determining what law is clearly established and whether a state court applied that law unreasonably.

Clark v. Murphy, 331 F.3d 1062, 1069 (9th Cir.2003). A state court decision is "contrary to" the Supreme Court's clearly established precedents if the decision applies a rule that contradicts the governing law set forth in those precedents, thereby reaching a conclusion opposite to that reached by the Supreme Court on a matter of law, or if it confronts a set of facts that is materially indistinguishable from a decision of the Supreme Court but reaches a different result. *Terry Williams*, 529 U.S. at 405-06, 120 S.Ct. 1495.

Under the "unreasonable application" prong, a federal court may grant relief where a state court "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular ... case," or "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at 407, 120 S.Ct. 1495. To show that a state court's application of Supreme Court precedent was "unreasonable," the petitioner must establish that the state court's decision was not merely incorrect or erroneous, but "objectively unreasonable." *Id.* at 409-10, 120 S.Ct. 1495.

In this case, although both parties agree that AEDPA applies, they disagree over the *level* of deference owed to the California Supreme Court's decision in light of its summary nature. Pinholster argues that, because the court found only that there was insufficient evidence to make a prima facie claim for relief and allegedly never reached the actual merits of the claim, we review the court's decision

without deference. The State, by contrast, argues that because the court's summary denial of Pinholster's claim was an adjudication on the merits, we apply the usual deference required by AEDPA

Under our precedent, the California Supreme Court's denial of Pinholster's petition for writ of habeas corpus "on the substantive ground that it is without merit," *Pinholster II*, 525 F.3d at 754, constitutes a decision on the merits of his federal claim. *See Hunter v. Aispuro*, 982 F.2d 344, 347-48 (9th Cir.1992) (noting that "the California Supreme Court's denial of a habeas petition without comment or citation constitute[s] a decision on the merits of the federal claims" (citing *Harris v. Superior Court*, 500 F.2d 1124, 1127-29 (9th Cir.1974) (en banc))); *Gaston v. Palmer*, 417 F.3d 1030, 1038 (9th Cir.2005) (recognizing that "[w]e construe 'postcard' denials such as these to be decisions on the merits" (citing *Hunter*, 982 F.2d at 348)). The Supreme Court has not addressed the question of the proper measure of deference that applies under AEDPA where, as here, a state court provides no rationale for its decision denying habeas relief on the merits, and where, as here, no other state court decision has addressed the claims at issue. We have held, however, that in such situations, we "perform an 'independent review of the record' to ascertain whether the state court decision was objectively unreasonable." *Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir.2003) (quoting *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir.2000)); *see also Cooper v. Brown*, 510 F.3d 870, 921 (9th Cir.2007); *Lewis v. Mayle*, 391 F.3d at 996. Such "[i]ndependent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court

decision is objectively unreasonable." *Himes*, 336 F.3d at 853.[4]

III. DISCUSSION

Pinholster argues that the California Supreme Court's summary denial of his Sixth Amendment claims of ineffective assistance of counsel at the guilt and penalty phases of his trial was objectively unreasonable under AEDPA. Because the California Supreme Court issued its last decision in October 1997, we apply, as the relevant "clearly established Federal law" at that time, the Supreme Court's familiar two-part standard for analyzing ineffective assistance claims set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Terry Williams*, 529 U.S. at 391, 120 S.Ct. 1495 (noting that "[i]t is past question that the rule set forth in *Strickland* qualifies as clearly established Federal law, as determined by the

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[4] We need not determine in this case whether our prior decisions properly held that AEDPA deference applies to silent state court decisions such as the denial at issue here, or whether that standard of deference applies to claims involving new evidence introduced on federal habeas. *See, e.g., Brown v. Smith*, 551 F.3d 424, 429 (6th Cir.2008) (reviewing an ineffective assistance of counsel claim without AEDPA deference in light of new evidence introduced by a diligent-petitioner). Whether we review the state court's decision de novo or for objective unreasonableness with an independent review of the record, we would grant the writ as to Pinholster's penalty phase claim and deny the writ as to his guilt phase claims. Accordingly, we will assume for purposes of this opinion that the stricter unreasonableness standard applies.

Supreme Court of the United States," and that "[the] Court's precedent dictated that the Virginia Supreme Court apply the *Strickland* test at the time that court entertained Williams' ineffective-assistance claim" (internal quotation marks omitted)).

In doing so, we note that the Court has repeatedly applied *Strickland*'s ineffective assistance standard to cases where, as here, the trial occurred before *Strickland* was decided on May 14, 1984.[5] In *Burger v. Kemp*, 483 U.S. 776, 777, 794, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987), for example, the Court applied the *Strickland* standard in evaluating trial counsel's performance where the habeas petitioner was convicted and sentenced to death on January 25, 1978, over six years before *Strickland* was decided. Additionally, in *Woodford v. Visciotti*, 537 U.S. 19, 21, 22, 123 S.Ct. 357, 154 L.Ed.2d 279 (2003) (per curiam), the Court applied the *Strickland* standard where the petitioner was convicted and sentenced a year before *Strickland* was decided, *see People v. Visciotti*, 2 Cal.4th 1, 5 Cal.Rptr.2d 495, 825 P.2d 388 (1992), and where, as here, the petitioner's ineffective assistance claims were governed by AEDPA, *see* 537 U.S. at 21, 123 S.Ct. 357.

Given that AEDPA deals only with the state court's adjudication of a claim, it does nothing to alter the standard of care to which trial counsel is held. At the same time, because Pinholster's conviction was not final when *Strickland* was decided, he is entitled to rely on *Strickland* in challenging his conviction. *See Teague v. Lane*, 489

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[5] As previously noted, Pinholster's trial concluded on May 7, 1984.

U.S. 288, 304-05, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987).

To prevail under *Strickland*, the petitioner must first "show that counsel's performance was deficient." 466 U.S. at 687, 104 S.Ct. 2052. To be "deficient," counsel's trial performance must be objectively unreasonable "under prevailing professional norms" and under "all the circumstances" of the particular case. *Id.* at 687-88, 104 S.Ct. 2052. Our inquiry into "counsel's performance [is] highly deferential," and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689, 104 S.Ct. 2052. Given the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," the petitioner carries the burden of showing that the challenged action could not be viewed as sound trial strategy. *Id.*

"Second, the [petitioner] must show that the deficient performance prejudiced the defense." *Id.* at 687, 104 S.Ct. 2052. For us to find prejudice, "[i]t is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693, 104 S.Ct. 2052. "On the other hand, ... [the petitioner] need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* Rather, "[t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A

reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052.

Following AEDPA's enactment, the Supreme Court has reiterated that we apply a "case-by-case approach to determining whether an attorney's performance was unconstitutionally deficient under *Strickland*." *Rompilla v. Beard*, 545 U.S. 374, 393-94, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) (O'Connor, J., concurring). In doing so, however, the Court has instructed that its post-AEDPA ineffective assistance of counsel decisions are clearly relevant for the purpose of informing the interpretation and application of the standards originally announced in *Strickland*.

In *Wiggins v. Smith*, for example, where the petitioner's trial originally took place in 1989, the Court observed that "[o]ur opinion in [*Terry*] *Williams* ... is illustrative of the proper application of [*Strickland*'s] standards." 539 U.S. 510, 514, 522, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). The *Wiggins* Court explained that "[w]hile [*Terry*] *Williams* had not yet been decided at the time the Maryland Court of Appeals rendered the decision at issue in [*Wiggins*]," the Court's reliance on *Terry Williams* was nonetheless proper because "Williams' case was before [the Court] on habeas review," and because the Court "made no new law in resolving Williams' ineffectiveness claim" but merely applied the established holding in *Strickland*. *Id.* at 522, 123 S.Ct. 2527. The *Wiggins* Court thus reached its conclusion that counsel rendered ineffective assistance under *Strickland* in part by distinguishing the facts in *Wiggins* from those in *Terry Williams*:

> [I]n contrast to the petitioner in *Williams* ..., Wiggins does not have a record of violent conduct that could have been introduced by the State to offset this powerful mitigating narrative. As the Federal District Court found, the mitigating evidence in this case is stronger, and the State's evidence in support of the death penalty far weaker, than in *Williams*, where we found prejudice as the result of counsel's failure to investigate and present mitigating evidence.

539 U.S. at 537-38, 123 S.Ct. 2527 (citation omitted). Similarly, in *Rompilla*, decided in 2005, the Court repeatedly cited *Terry Williams* and *Wiggins* in reversing an ineffective assistance case in which the state trial took place in 1988 and in which the state postconviction decision issued in 1998. *See Rompilla*, 545 U.S. at 378-93, 387 n. 7, 125 S.Ct. 2456;*Commonwealth v. Rompilla*, 539 Pa. 499, 653 A.2d 626, 628 (1995). Most recently, in *Porter v. McCollum*, the Court relied on post-AEDPA cases in determining the "prevailing professional norms" at the time of Porter's trial in 1988. 558 U.S. ----, 130 S.Ct. 447, 452, --- L.Ed.2d ---- 9-10 (2009) (per curiam).

Thus, we hold that we are required to apply the instructions contained in the Supreme Court's post-AEDPA ineffective assistance of counsel cases to inform and construe the meaning of *Strickland* as it applies to Pinholster's trial and postconviction proceedings. In other words, *Terry Williams*,

Wiggins, Rompilla, and *Porter* help illuminate which applications of *Strickland* are unreasonable under AEDPA.

A. The Guilt Phase

Our three-judge panel unanimously held that, even assuming that counsel's representation at the guilt phase of the trial constituted deficient performance, the district court properly denied an evidentiary hearing and granted summary judgment in favor of the State because Pinholster failed to make a colorable showing of prejudice. *Pinholster II*, 525 F.3d at 757, 761, 775, 777;*see also Strickland*, 466 U.S. at 697, 104 S.Ct. 2052 (stating that a court may assume ineffective assistance to resolve a claim on the basis of prejudice). We reach the same conclusion, and adopt Judge Fisher's discussion as to prejudice in the full paragraph at *Pinholster II*, 525 F.3d at 777, which best summarizes the panel's prejudice holding. We find no useful purpose would be served by repeating extensive work already contained in the Federal Reporter. On these grounds, we affirm the district court's denial of Pinholster's request for an evidentiary hearing and denial of habeas relief on his claim of ineffective assistance of counsel at the guilt phase.

B. The Penalty Phase

In its appeal, the State argues that the California Supreme Court was not objectively unreasonable in summarily denying Pinholster's claim that his attorneys rendered ineffective assistance at the penalty phase of his trial by failing to investigate, to discover, and to introduce readily

available mitigation evidence. For the following reasons, and based on our independent review of the record, we disagree. *See Himes*, 336 F.3d at 853.

1. Federal Evidentiary Hearing

The State contends that the district court abused its discretion in granting Pinholster a federal evidentiary hearing on his penalty phase ineffective assistance claim because the court allegedly failed to consider whether Pinholster properly developed a factual basis for the claim in the California Supreme Court. As a result, the State argues, the district court improperly reached its decision to grant habeas relief based on evidence that was not before the state court.

The State's contention regarding the federal evidentiary hearing is unavailing. The State is correct that when a petitioner challenges a state habeas court's *factual* conclusions, the relevant evidence is restricted to that presented to the state habeas court: Under AEDPA, federal postconviction relief is available on such claims only if the state habeas court's adjudication "resulted in a decision that was based on an unreasonable determination of the facts *in light of the evidence presented in the State court proceeding*." 28 U.S.C. § 2254(d)(2) (emphasis added).

Here, however, Pinholster challenges the California Supreme Court's *legal* conclusions. Such claims are governed not by § 2254(d)(2), but by § 2254(d)(1). As noted above, under § 2254(d)(1), relief is available if the state habeas court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

established Federal law, as determined by the Supreme Court of the United States." Significantly, Congress omitted "in light of the evidence presented in the State court proceeding" from § 2254(d)(1), while including that language in § 2254(d)(2). This omission strongly indicates that Congress did not intend to restrict the inquiry under § 2254(d)(1) only to the evidence introduced in the state habeas court, or to have federal courts imply any such restriction.

In addition, AEDPA has an independent provision that expressly restricts a habeas petitioner's ability to introduce new evidence in federal court. *See* 28 U.S.C. § 2254(e)(2). That restriction applies when the petitioner was not diligent in seeking to develop the new evidence in state court. *Holland v. Jackson*, 542 U.S. 649, 652-53, 124 S.Ct. 2736, 159 L.Ed.2d 683 (2004). Neither § 2254(d)(1) nor § 2254(e)(2) contains any language indicating that evidence properly introduced under § 2254(e)(2) is irrelevant when applying § 2254(d)(1). On the contrary, § 2254(e)(2) establishes that, when drafting AEDPA, Congress was aware that federal habeas petitioners sometimes rely on evidence not presented in the state habeas court, and that Congress responded to that issue with an *explicit* statutory restriction on the introduction of such evidence.

The legal backdrop against which Congress drafted and enacted AEDPA also informs our construction of § 2254(d)(1). Historically, a federal habeas petitioner could rely on new evidence as long as that evidence did not so alter the underlying claims as to render them unexhausted. *Vasquez v. Hillery*, 474 U.S. 254, 260, 106 S.Ct. 617, 88 L.Ed.2d

598 (1986). As § 2254(e)(2) demonstrates, Congress included specific language in AEDPA when it intended to change that traditional practice. Congress's failure to include any such language in § 2254(d)(1), by contrast, demonstrates that Congress did *not* intend for § 2254(d)(1) to imply any additional departure from the *Vasquez* rule beyond that contained in § 2254(e)(2).

Supreme Court precedent also fails to support the State's position on this issue. In *Michael Williams*-the Court's most significant decision regarding evidentiary development in federal habeas proceedings under AEDPA-the Court did not tie the right to a federal evidentiary hearing to a prior determination that the state habeas court had unreasonably applied Supreme Court law to the record before it. *Michael Williams v. Taylor*, 529 U.S. 420, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). Nor did the Court indicate that evidence introduced at a properly conducted federal evidentiary hearing must be disregarded unless the federal court has already concluded that the state habeas court decision involved an unreasonable application of Supreme Court law. *See id.* at 437-44, 120 S.Ct. 1479. The clear import of *Michael Williams* is, to the contrary, that any new evidence admissible either under § 2254(e)(2) or because the petitioner did not exhibit a lack of diligence in state court, is pertinent to the petitioner's claims under AEDPA.

Similarly, in *Holland*, a case governed by § 2254(d)(1), although the Court explained that a state habeas court's decision generally must be reviewed in light of the evidence presented at the state habeas proceeding, the Court immediately thereafter noted

that a federal habeas petitioner can introduce new evidence if he "was not at fault in failing to develop that evidence in state court." 542 U.S. at 652-53, 124 S.Ct. 2736 (citing *Michael Williams*, 529 U.S. at 431-37, 120 S.Ct. 1479). As in *Michael Williams*, nowhere did the *Holland* Court indicate that such new evidence should be ignored absent an earlier determination of unreasonableness under § 2254(d)(1). [6] To the contrary, the Court first concluded that the new evidence presented by the petitioner during the federal habeas proceedings was not admissible under *Michael Williams* or § 2254(e)(2), and only then concluded that the state habeas court's decision was reasonable under § 2254(d)(1). *Holland*, 542 U.S. at 652-53, 124 S.Ct. 2736.

Bradshaw v. Richey also suggests that the reasonableness of a state habeas court's decision under § 2254(d)(1) should be considered only *after* determining what evidence is admissible under *Michael Williams* and § 2254(e)(2). 546 U.S. 74, 79, 126 S.Ct. 602, 163 L.Ed.2d 407 (2005). *Bradshaw* faulted the Sixth Circuit for "relying on evidence that was not properly presented to the state habeas courts without first determining (1) whether respondent was at fault for failing to develop the factual basis for his claims in state court, or (2) whether respondent satisfied the criteria established by 28 U.S.C. §

[6] In fact, the *Holland* Court specifically noted, without endorsing, the practice in certain circuits of reviewing claims based on such new evidence de novo because "there is no relevant state-court determination to which one could defer." *Id.* at 653, 124 S.Ct. 2736.

2254(e)(2)." 546 U.S. at 79, 126 S.Ct. 602 (citing *Michael Williams*, 529 U.S. at 430-32, 120 S.Ct. 1479). As in both *Michael Williams* and *Holland*, the *Bradshaw* Court nowhere indicated that the Sixth Circuit should have first considered the state habeas court's decision in light of the evidence produced in the state habeas proceeding, then considered whether the new evidence was admissible, and only then considered whether that new evidence warranted relief.

Given AEDPA's statutory text and the Supreme Court's governing precedent, the most reasonable approach to any new evidence introduced in federal habeas proceedings is the most straightforward: Section 2254(e)(2) restricts the evidence that may be considered in federal habeas proceedings, and § 2254(d)(1) contains no additional restrictions on the relevant evidence. If the evidence is admissible under *Michael Williams* or § 2254(e)(2), and if it does not render the petitioner's claims unexhausted under *Vasquez*, then it is properly considered in evaluating whether the legal conclusion reached by the state habeas court was a reasonable application of Supreme Court law.

Importantly, here, the district court expressly found that Pinholster had met the requirements for an evidentiary hearing under AEDPA. In the addendum to its order granting habeas relief on Pinholster's penalty phase ineffective assistance claim, the district court stated, in relevant part:

> Under ... AEDPA, a petitioner is not entitled to an evidentiary hearing if he failed to develop the factual basis of a

> claim in state court. 28 U.S.C. § 2254(e)(2). "[A] failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *[Michael] Williams v. Taylor*, 529 U.S. 420, 432, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). "Diligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court; it does not depend ... upon whether those efforts could have been successful." *Id.* at 435 [120 S.Ct. 1479]. "Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Id.* at 437 [120 S.Ct. 1479].
>
> Pinholster sought an evidentiary hearing in state court regarding his claim that counsel was ineffective for failing to investigate and present mitigating evidence at the penalty phase. He did not fail to develop the factual basis of this claim in state court and an evidentiary hearing was appropriate.

Based upon our independent inquiry, we cannot say that the district court erred in its analysis. *See Holland*, 542 U.S. at 653, 124 S.Ct.

2736 (noting that in addition to the district court's failure to make the requisite findings for an evidentiary hearing, the Sixth Circuit also failed to "independently inquire into these matters"). Pinholster exercised diligence in pursuing an evidentiary hearing in state court regarding his mitigation ineffective assistance claim. By withdrawing its order to show cause and dismissing Pinholster's habeas petition on the merits, the state court denied Pinholster any further opportunity to develop the factual record in state court. Because Pinholster was diligent, the limitations of 28 U.S.C. § 2254(e)(2) are inapplicable. *See Holland*, 542 U.S. at 653, 124 S.Ct. 2736.[7]

Moreover, even if those limitations did apply, we find that both the federal and the state habeas petitions detail many substantially identical facts,

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[7] The dissent suggests that Pinholster was not diligent in presenting evidence in state court because he did not present the diagnoses of specific doctors (Drs. Olson and Vinogradov) during his first habeas petition. Diss. at 689. However, Pinholster *did* attempt to present mental health evidence in state court and was rejected. Pinholster's request for an evidentiary hearing in state court was denied. To claim that he was not diligent because he did not present mental health evidence in state court nullifies AEDPA's exception for diligence, and is simply illogical. The dissent also argues that Pinholster "hasn't shown he couldn't have returned to state court" to develop the record there. Diss. at 690. Again, the genesis of this requirement is unclear. AEDPA requires only that the defendant diligently attempt to present the evidence in state court. § 2254(e)(2). Pinholster tried, but was denied that opportunity, and we know of no case law suggesting that he needed to be rejected twice.

including trial counsel's failure to file a motion for a continuance to prepare a mitigation case for the penalty phase, counsel's introduction of Brashear's testimony, Pinholster's home life as a child, and Pinholster's educational, medical, social, psychological, and family background. Although Pinholster substituted experts during the proceedings who ultimately developed different mental impairment theories, these experts nonetheless relied on the same background facts that Pinholster presented to the state court. Accordingly, if § 2254(e)(2) were to limit the scope of the evidence before us, it would exclude only the new mental impairment theories introduced in federal court, and their exclusion would not affect our result.

We therefore conclude that the mitigation evidence introduced at the federal evidentiary hearing is properly before us in considering Pinholster's penalty phase ineffective assistance claim. For the same reasons, and because the facts adduced at the evidentiary hearing have not fundamentally altered the penalty phase ineffective assistance claim that the California Supreme Court already considered, we also hold that Pinholster has properly exhausted this claim. *See Weaver v. Thompson*, 197 F.3d 359, 364 (9th Cir.1999) (rejecting an exhaustion challenge as "unwarranted hairsplitting" where at each step of the habeas proceedings the legal claim remained the same, but the precise factual predicate changed after the evidentiary hearing).

2. Deficient Performance

In *Strickland*, the Court held that "counsel has

a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." 466 U.S. at 691, 104 S.Ct. 2052.*Strickland* also instructs that "[t]he proper measure of attorney performance [is] reasonableness under prevailing professional norms." *Id.* at 688, 104 S.Ct. 2052. As one example of a "guide[ ] to determining what is reasonable," the Court referenced "[p]revailing norms of practice as reflected in American Bar Association standards." *Id.*; *see also Rompilla*, 545 U.S. at 387, 125 S.Ct. 2456 ("[W]e long have referred [to these ABA Standards] as guides to determining what is reasonable." (citation and internal quotation marks omitted) (alterations in original)).

At the time of Pinholster's trial in 1984, the ABA standards in place recognized that counsel in capital cases had a duty to investigate thoroughly the client's background and the circumstances of the case in an effort to uncover mitigating evidence relevant to the penalty phase defense:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

Rompilla, 545 U.S. at 387, 125 S.Ct. 2456 (quoting 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.)). This duty has been unequivocally recognized by the Supreme Court, which recently held that "[i]t is unquestioned that under the prevailing professional norms at the time of [Pinholster's] trial, counsel had an 'obligation to conduct a thorough investigation of the defendant's background.' " *Porter*, 130 S.Ct. at 453 (quoting *Terry Williams*, 529 U.S. at 396, 120 S.Ct. 1495 (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, 4-55 (2d ed. 1980))); *see also Wiggins*, 539 U.S. at 524, 123 S.Ct. 2527 ("The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing.... Investigation is *essential* to fulfillment of these functions." (quoting 1 ABA Standards for Criminal Justice 4-4.1, commentary, 4-55 (2d ed. 1982)) (emphasis added)).

Since 1984-and in reliance on the same ABA Standards in place at the time of Pinholster's trial-the Court has elaborated that *Strickland* 's duty to investigate requires that counsel "present[ ] and explain[ ] the significance of all the available [mitigation] evidence." *Terry Williams*, 529 U.S. at 399, 120 S.Ct. 1495. The Court has also found ineffective assistance where, "[d]espite these well-defined norms" articulated in the ABA Standards, "counsel abandoned their investigation of [the] petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Wiggins*, 539 U.S. at 524, 123 S.Ct. 2527.

The dissent labors to convince us that *Bobby v. Van Hook*, 558 U.S. ----, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009), somehow changed the rules with regard to the ABA standards. Diss. at 690-95. However, the Court held that it is permissible to use a restatement of professional standards to help determine an attorney's obligation towards a client only when those standards "describe the professional norms prevailing when the representation took place." *Van Hook*, at 16. That is precisely what we do here. We refer to the 1982 edition of the ABA standards that were in effect at the time of Pinholster's 1984 trial. Moreover, in *Van Hook*, the Sixth Circuit erroneously stated that attorneys "must fully comply" with the ABA guidelines. *Id.* (citing *Van Hook v. Anderson*, 560 F.3d 523, 526 (6th Cir.2009)). Here we make clear, as the Supreme Court has, that such standards do not define reasonable representation, but rather are "guides to determining what is reasonable." *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. The

dissent's jeremiad is therefore misplaced.

In *Porter*, the Supreme Court found that the counsel's investigation "clearly did not satisfy" the aforementioned professional norms. 130 S.Ct. at 453. Porter's counsel met with him only once to discuss the penalty phase and did not obtain school, medical, or military records that counsel should have known would have led to significant mitigating evidence. *Id.* The Court also rejected counsel's excuse that Porter was "fatalistic and uncooperative." *Id.*[8]

Similarly, the evidence here shows that Pinholster's trial counsel completely failed to discharge their responsibility to conduct the investigation required under *Strickland*. One week before the penalty hearing, counsel told the judge that they "did not prepare a case in mitigation" because they "felt there would be no penalty phase hearing." Notwithstanding counsel's admission, they inexplicably declined to request a continuance-even though the judge indicated he would readily grant one-because they did not believe the extra time "would make a great deal of difference." Billing records confirm counsel's own admissions that they spent almost no time preparing for the penalty phase

[8] The dissent also uses this excuse, claiming that Pinholster was uncooperative in putting on a penalty-phase defense and claiming that he probably (and "rational[ly]") preferred to die than to spend his life in prison. Diss. at 16137-38. Pinholster said no such thing, and all evidence-including the habeas petition itself-speaks to the contrary. Regardless, a difficult or fatalistic client does not give counsel license to collapse into an armchair and admit defeat. *See Porter*, at 454.

hearing that would determine whether Pinholster would live or die.

At the penalty phase hearing, counsel waived their opening statement and presented only one witness, Pinholster's mother, Brashear, whose testimony the district court aptly described as "brief ... damaging, incomplete, and inaccurate." Brashear testified about Pinholster's head injuries as a child as well as his epilepsy, but because the jurors lacked any accompanying expert testimony to explain the ramifications of those conditions they were left without the ability to make informed judgments about that evidence. Trial counsel also failed to obtain any of the readily available medical, psychological, law enforcement, or school records for Pinholster or his siblings. Consequently, when they asked their retained psychiatrist, Dr. Stalberg-whom they hired only after the trial started-about the availability of mitigation evidence, they failed to provide him with materials that were necessary for him to make an informed determination.

The dissent disparages these damaging admissions. Rather than concede the lawyer's admissions, the dissent employs pop-linguistics to argue that what Brainard *really* meant when he said he did not recall conducting a reasonable investigation was that he actually did conduct a reasonable investigation. Diss. at 701-02. The dissent also makes much of the fact that the admissions were made after the trial, *id.* at 702, 706-07, but the Supreme Court's recent decision in *Porter* relied heavily on the counsel's post-conviction admission that he "had only one short meeting with Porter regarding the penalty phase ... and that [h]e did not

obtain any of Porter's school, medical, or military service records or interview any members of Porter's family." 130 S.Ct. at 453. The Court clearly does not share the dissent's notion that post-conviction admissions by legal counsel do not count because attorneys are apt to lie. Diss. at 701 n.10.

Here, counsel's performance was far more deficient than that of the attorneys in *Terry Williams*, *Wiggins*, and *Rompilla*, where in each case the Supreme Court upheld the petitioner's ineffective assistance claim. In *Terry Williams*, "[t]he record establishe[d] that counsel did not begin to prepare for th[e] [penalty] phase of the proceeding until a week before the trial," that counsel had called only a total of four witnesses, and that if counsel had not "failed to conduct an investigation[,] th[ey] would have uncovered extensive records graphically describing Williams' nightmarish childhood." 529 U.S. at 369, 395, 120 S.Ct. 1495. In addition, in *Wiggins*, "[a]t no point did [counsel] proffer any evidence of petitioner's life history or family background," nor did counsel "expand their investigation beyond the PSI [Presentence Investigation Report] and the DSS [Department of Social Services] records." 539 U.S. at 516, 524, 123 S.Ct. 2527. Finally, in *Rompilla*, counsel called five of Rompilla's family members as witnesses at the penalty phase and examined the reports of three mental health witnesses, but failed to review any of the materials in the court file on Rompilla's prior conviction, despite knowledge of the prosecution's intention to introduce those materials at trial. *See* 545 U.S. at 381-86, 125 S.Ct. 2456.

Pinholster's trial counsel performed even less review of the readily available records than did the

lawyer in *Wiggins*, who reviewed both the PSI report and the DSS records before the penalty phase. Moreover, similar to counsel in *Terry Williams*, Pinholster's attorneys spent less than a week preparing for the penalty phase, but in Pinholster's case, the preparation lasted less than an average workday. Also, while the lawyers in both *Terry Williams* and *Rompilla* performed deficiently even though they interviewed and called multiple witnesses at the penalty phase, Pinholster's counsel interviewed and presented just one witness, whose testimony was not only misleading, but also self-serving and harmful to Pinholster's defense.

Nor, as the district court properly found, were counsel's actions the result of any kind of reasonable strategic decision. Instead, counsel mistakenly thought that there would be no penalty phase at all, because the State had allegedly failed to provide notice of its intent to introduce aggravating evidence. As previously noted, however, the state trial court held a hearing on that issue and determined that the State had served Pinholster with adequate notice during the period in which he represented himself pre-trial. Nevertheless, even after learning of their mistake, counsel declined the court's invitation to move for a continuance to prepare for the penalty phase, stating on the record that they did not believe the extra time "would make a great deal of difference."[9] Such an uninformed decision cannot, by

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[9] Even assuming that the State had failed to provide adequate notice, counsel would not have been absolved of their duty to investigate and present mitigation evidence because the State could have relied solely on the evidence introduced at the guilt

(continued...)

any reasonable stretch of the imagination, "be considered sound trial strategy." *See Strickland*, 466 U.S. at 689, 104 S.Ct. 2052.

In exactly such an unreasonable stretch, our dissenting colleague demonstrates yet again why he would be such a talented writer of fiction. He concocts a fantastical trial strategy for Pinholster's attorneys despite their own admissions that they were simply unprepared. Counsel told the trial judge a week before the penalty hearing much too soon for them to be "falling on their swords"-that they had not prepared a mitigation case.[10] Diss. at 701 n.10. The truth of that claim was borne out a week later. To give attorneys the benefit of the doubt is one thing, but to fabricate an excuse that the attorneys themselves could not conjure up is another. The

(...continued)
phase in seeking a death sentence, *see* CAL. PENAL CODE § 190.3. At a minimum, counsel had a duty to investigate Pinholster's background or to make a reasonable, informed decision that such an investigation was unnecessary. *See Strickland*, 466 U.S. at 691, 104 S.Ct. 2052; *Terry Williams*, 529 U.S. at 396, 120 S.Ct. 1495 ("trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background").

[10] Although Brainard failed to make up an excuse for his lack of preparation, the dissent gives him one, claiming that the attorney was employing the tactic of "falling on your sword" to help his client on habeas. Diss. at 701 n.10. This flight of fancy goes too far. The Sixth Amendment guarantee of effective counsel, *see Cuyler v. Sullivan*, 446 U.S. 335, 344, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), would be rendered meaningless if every attorney who is unable to explain his ineffective assistance is assumed to be effective because he is "falling on his sword."

dissent suggests that counsel appeared *so* ineffective that they *must* have had something sinister in mind; in other words, *no one* could be *that* incompetent. However, given that counsel claimed to be unprepared for the penalty phase, rejected the offer of additional time to prepare, presented only one devastating "mitigation" witness, and secured their client a death sentence, it is obvious that they were not merely being sneaky; they were incompetent, and they failed miserably to discharge the duties they owed to their client at the penalty phase of his murder trial.

To be sure, in some cases counsel may have "sound reason to think it would have been pointless to spend time and money on ... additional investigation," thereby rendering counsel's failure to discover additional mitigating evidence reasonable. *See Rompilla*, 545 U.S. at 383, 125 S.Ct. 2456;*see also, e.g., Burger*, 483 U.S. at 792-95, 107 S.Ct. 3114 (finding "counsel's decision not to mount an all-out investigation into petitioner's background in search of mitigating circumstances" reasonable where all potential witnesses brought to his attention provided information predominantly harmful to the defense). But such decisions are reasonable only because counsel made them *after* an investigation adequate enough to make an informed choice. *See Wiggins*, 539 U.S. at 527, 123 S.Ct. 2527 (" *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy."), *Duncan v. Ornoski*, 528 F.3d 1222, 1234 (9th Cir.2008) (interpreting *Strickland* to mean that "decisions that are made before a complete

investigation is conducted are reasonable only if the level of investigation was also reasonable"), *cert. denied*, — U.S. —, 129 S.Ct. 1614, 173 L.Ed.2d 1001 (2009); *Correll v. Ryan*, 539 F.3d 938, 948 (9th Cir.2008) ("A decision by counsel not to present mitigating evidence cannot be excused as a strategic decision unless it is supported by reasonable investigations."); *Jennings v. Woodford*, 290 F.3d 1006, 1014 (9th Cir.2002) ("Although defense counsel is empowered to make such strategic decisions, *Strickland* demands that such decisions be reasonable and informed.").

Here, defense counsel conducted no investigation into Pinholster's background *at all*, aside from interviewing his mother. Not only was counsel's investigation grossly inadequate; they also failed to look into any of the limited mitigating evidence that they *did* discover in their interview with Pinholster's mother, such as the evidence of Pinholster's epilepsy. Since Pinholster's counsel did not even attempt a meaningful investigation, we can see no basis for concluding that they could have had any "sound reason" to believe that "*additional* investigation," *see Rompilla*, 545 U.S. at 383, 125 S.Ct. 2456 (emphasis added), would not have, as they termed it, "ma[d]e a great deal of difference."

Finally, the State's attempt to excuse counsel's failure to conduct the requisite investigation because Pinholster allegedly told them "not to put on a penalty defense" fails. As noted, this approach has been rejected by the Supreme Court. *See Porter*, 130 S.Ct. at 453. Furthermore, in support of this assertion, the State relies on an interview report written by a defense investigator in July 1991.

However, as the district court noted, because neither Pinholster nor the defense investigator testified at the evidentiary hearing, this statement is hearsay.[11] Regardless of its truth, the record demonstrates that the statement did not influence trial counsel's performance, because trial counsel *did* present a penalty defense, albeit a constitutionally defective one. Moreover, even assuming that the statement is true, it did not relieve counsel of their constitutional duty to investigate. "A defendant's insistence that counsel not call witnesses at the penalty phase does not eliminate counsel's duty to investigate mitigating evidence or to advise the defendant of the potential consequences of failing to introduce mitigating evidence, thereby assuring that the defendant's decision regarding such evidence is informed and knowing." *Williams v. Woodford*, 384 F.3d 567, 622 (9th Cir.2004). Here, the State has failed to present any evidence that Pinholster was counseled concerning the possible repercussions of not introducing mitigation evidence, thereby enabling him to make any kind of informed, knowing decision on the matter. Counsel's admissions on the record instead reflect that they simply failed to prepare a mitigation case because they did not expect a penalty phase to occur, and then, out of apparent apathy or neglect of duty, declined a continuance without an informed or strategic basis for doing so.

It is prima facie ineffective assistance for counsel to "abandon [ ] their investigation of [the]

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[11] Although the State alleges that "[t]he parties had already stipulated to the admissibility of the report," the State provides no record evidence to that effect, nor can we find any.

petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Wiggins*, 539 U.S. at 524-25, 123 S.Ct. 2527;*see also Siripongs v. Calderon*, 35 F.3d 1308, 1316 (9th Cir.1994) (holding that counsel performed deficiently by failing to "conduct more than a cursory investigation" and by making "no attempt to humanize [the defendant] before the jury"). Accordingly, we hold that counsel's almost complete failure to investigate the readily available mitigation evidence in Pinholster's case was objectively unreasonable under both the prevailing norms of practice, as reflected in the ABA Standards in place at the time of his trial, as well as the clearly established federal law in *Strickland*.

3. Prejudice

We also hold that trial counsel's constitutionally deficient performance prejudiced Pinholster's defense. *See Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. As noted, to demonstrate prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052.

Regarding prejudice at capital sentencing, "the question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695, 104 S.Ct. 2052. This inquiry requires us to "reweigh the evidence in aggravation against the

totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534, 123 S.Ct. 2527. The "totality of the available mitigation evidence" includes "both that adduced at trial, and the evidence adduced in the habeas proceeding[s]." *Terry Williams*, 529 U.S. at 397, 120 S.Ct. 1495. More particularly, given California's requirement that a unanimous jury impose any death sentence, *see* CAL. PENAL CODE § 190.4(b), our inquiry is whether, based on the sum of this evidence, "*there is a reasonable probability that at least one juror would have struck a different balance*," *Wiggins*, 539 U.S. at 537, 123 S.Ct. 2527 (emphasis added).

a. Aggravating Evidence

As the district court noted, there was substantial aggravating evidence in this case. The State presented evidence that Pinholster beat both of the murder victims, stabbed one of them with a knife, and took their wallets, all for a paltry gain of $23 and a quarter-ounce of marijuana. Yet, when Pinholster took the stand at trial, he denied murdering the victims and boasted that he had committed hundreds of robberies over the previous six years, using a gun, but never a knife, to victimize drug dealers. He was also openly disrespectful of the deputy prosecutor, appeared unconcerned with the seriousness of the underlying murders, and even laughed or smirked several times during the deputy prosecutor's cross-examination.

In addition, the State introduced evidence of Pinholster's earlier conviction for kidnapping with a knife, of his threat to kill the State's lead witness, and of his assault of another individual with a

straight razor. Pinholster had a history of other violent outbursts as well, including striking a bailiff after a court proceeding, resisting arrest and assaulting several police officers, and once, during an apparent epileptic seizure, hitting his wife and breaking her jaw. The jury also heard evidence of Pinholster's juvenile gang activities and of his substantial disciplinary record at the Los Angeles County Central Jail, where his numerous infractions encompassed throwing urine at guards, threatening and assaulting guards, and initiating fights with other inmates. As a result of this behavior, jail officials classified him as a disciplinary problem and gave him a low-calorie diet reserved for the most recalcitrant inmates.

b. Available Mitigation Evidence

Although the State's aggravating evidence was severely detrimental to Pinholster's case, the record reflects that the harmful effect of that evidence could have been significantly mitigated had Pinholster's trial counsel performed competently. Instead, the only mitigation evidence introduced by defense counsel at the penalty phase was the inaccurate, damaging testimony of Pinholster's mother, Brashear. If counsel had conducted even a minimally adequate investigation, however, they would have found a trove of additional mitigation evidence that would have humanized Pinholster to the jury and, at the same time, contradicted Brashear's misleading version of events. This omitted, but readily available, evidence also would have done much to counter the State's aggravating evidence, which Brashear's testimony failed to rebut or even address.

i. Organic Brain Damage

First, counsel would have discovered evidence of the organic basis for Pinholster's mental health troubles that developed as a result of his traumatic childhood head injuries. During the penalty phase, Brashear testified that when Pinholster was two, she injured his head "quite badly" when she accidentally ran over him with her car. The accident nearly tore off one of his ears. She also testified that, when he was four or five, she had a car accident in which his head went through the windshield. Pinholster's counsel, however, failed to present any medical evidence regarding the consequences of those injuries. As a result, the State argued to an uninformed jury that these injuries were insignificant:

> He was run over by a car when he was three years old. That's very unfortunate. There is no evidence of any brain damage. A lot of children get dropped, fall from their cribs or whatever. A couple of years later he went through a car window, not hospitalized, got medical care.

In addition, Brashear wrongly testified that Pinholster's epilepsy began after a severe beating that he incurred in jail at the age of eighteen. She then changed her story and claimed that she discovered his epilepsy by witnessing the end of a seizure, at which point he told her about his condition. Given her confusing testimony, however, the State argued at the end of the penalty phase that

Pinholster did not have epilepsy at all. The State also argued to the jury that if Pinholster truly had epilepsy, "a doctor would have been brought in to tell you that. Medical records, something." In contrast, readily available mitigation evidence would have shown that Pinholster's childhood injuries likely had long-term effects on his mental health.

The evidence demonstrates beyond a doubt that Pinholster suffered from epilepsy from a young age. Pinholster was first diagnosed with epilepsy and treated with anti-seizure medication when he was only nine years old, and he frequently suffered complex partial and grand mal seizures thereafter. Dr. Olson concluded that the two car accidents damaged the frontal lobes of Pinholster's brain, an injury that frequently causes impulsive behaviors. This damage, Dr. Olson explained, was evidenced both by Pinholster's epilepsy and by his abnormal EEG reading as a child.[12] Dr. Vinogradov similarly concluded that Pinholster's childhood head injuries resulted in organic, pre-frontal brain damage that changed his personality and explained his aggressive, violent, and antisocial behavior, while Dr. Stalberg characterized the injuries as possibly "devastating" and likewise connected them to Pinholster's epilepsy.

[12] The dissent spends some time arguing that Pinholster's epilepsy is irrelevant because he was not suffering a fit when he committed the crimes. The point, however, is that Pinholster's brain was so damaged by his numerous head traumas that it caused epilepsy. In other words, epilepsy is an indicator of pre-frontal brain damage, and pre-frontal brain damage frequently leads to aggressive, impulsive behaviors. The jury did not hear this evidence.

This additional medical evidence would have helped counter the State's aggravation case in three respects. First, evidence that Pinholster's brain damage may have influenced, or even caused, his behavior at the time of the crime may have led jurors to conclude that he was less morally culpable at the time of the offense, and at least one juror may have been inclined to refrain from voting in favor of a capital sentence. *See Wiggins*, 539 U.S. at 537, 123 S.Ct. 2527 (holding that prejudice is established if "there is a reasonable probability that at least one juror would have struck a different balance" between life and death). Evidence of organic brain injury in other cases has led juries to consider whether because a defendant's "behavior was physically compelled ... his moral culpability would have been reduced." *Caro v. Woodford*, 280 F.3d 1247, 1257-58 (9th Cir.2002). For this reason, evidence of serious mental health problems, including organic brain damage, is "precisely the type of evidence that we have found critical for a jury to consider when deciding whether to impose a death sentence." *Douglas v. Woodford*, 316 F.3d 1079, 1090 (9th Cir.2003). Here, as in *Porter*, it "was not reasonable to discount entirely the effect that [a psychiatrist's] testimony might have had on the jury or the sentencing judge." 130 S.Ct. at 455.

Second, properly presented evidence of Pinholster's brain injury, and its profound effect on his behavior, could have altered the jury's impressions of his detrimental guilt phase testimony and of his boastful, disrespectful demeanor by indicating an organic basis for his inappropriate expressions and for his tendency to exaggerate his

past. In this way, in the hands of a competent attorney," the harmful evidence provided by Pinholster's trial testimony and by his offensive manner could actually "have been used to support [his] claims of dysfunctional upbringing and continuing mental disorder." *See Correll*, 539 F.3d at 955.

Third, evidence of Pinholster's organic brain injury would have humanized him in the eyes of the jury, even if the jury concluded that his brain injury was not responsible for his actions during his commission of the crime. It is not necessary that there be a direct causal connection between a defendant's brain injury and the crime he commits for the existence of that injury to serve as a humanizing and therefore mitigating factor during sentencing. *See, e.g., Skipper v. South Carolina*, 476 U.S. 1, 4-5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) ("Although it is true that [the evidence] would not relate specifically to petitioner's culpability for the crime he committed, there is no question but that such [evidence] would be mitigating in the sense that [it] might serve as a basis for a sentence less than death." (citations and quotation marks omitted)) The very existence of organic neurological problems may serve as mitigating evidence at sentencing by eliciting sympathy or, at the very least, some degree of understanding from the sentencer. *See Douglas*, 316 F.3d at 1090;*see also Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir.1995) (holding that mental health evidence could be mitigating at the penalty phase "even though it is insufficient to establish a legal defense to conviction in the guilty phase"). Though the dissent mocks the fact that counsel did not attempt to humanize Pinholster, diss. at 692, the

Supreme Court clearly considers humanizing an important part of penalty-phase mitigation in a death penalty case. *See Porter*, at 454 ("The judge and jury at Porter's original sentencing heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability.")

ii. Abusive and Deprived Childhood

Second, if counsel had conducted an adequate investigation, they would have found evidence of Pinholster's abusive and deprived upbringing. Brashear minimized and distorted the true nature of Pinholster's relationship with his step-father when she testified at the penalty phase:

> Q: Did he get along with his stepfather, Mrs. Brashear? I am sorry. I know this is difficult for you.
>
> A: Well, at times. He would try to discipline him and sometimes I was objectionable to that. Scott has always-he had a mind of his own.
>
> Q: Do you feel that any of that punishment that was given to Scott was abusive or near abusive?
>
> A: Well, I think so at times. Scott would push to the limit. He was a boy that-he had his own way. My husband sometimes would lose his temper with him, yes. He always thought he was

> punishing him to make him see that wasn't the thing he was supposed to be doing, and Scott rebelled even when he was quite young. We got in quite a bit of arguments and hassles.
>
> Q: What kind of relationship does Scott have with his stepfather today?
>
> A: Well, it's okay. He just feels very bad for what has happened to Scott.
>
> Q: But is it a friendly relationship?
>
> A: Yes.

In stark contrast, the additional mitigation evidence showed that Pinholster suffered violent and continuous physical abuse during his early years. His brother, Terry, described this abuse as follows:

> [Our step-father] frequently beat Scott while Scott was a child; these beatings continued until Scott left our home. Bud would use his fists, a belt, or anything else available, including on at least one occasion a two by four board. Of all the children, Scott suffered the most frequent and violent beatings. The situation grew worse the older we got; it was not long before Scott received nothing positive at all from Bud. There was so much violence in our home I dreaded coming home each day.

Pinholster's half sister, Tammy, likewise recalled:

> Scott as a child was frequently physically abused by Scott's step-father, Bud Brashear. Bud hit Scott with his fists as often as several times within one week. Bud's punishments were unpredictable and severe. For instance, Bud once was awakened early and made all of us children run in circles in the back yard until we were near collapse. I have no recollection of Bud ever praising Scott or doing anything emotionally supportive for Scott.

Pinholster's psychiatric records also indicated that his step-father frequently used a paddle to hit him on the head, back, and shoulders, knocking him out at times without subsequent medical care. And relatives' additional declaration testimony showed that, beginning when Pinholster was one and a half years old, his maternal grandmother "beat the hell out of" him for resembling his biological father, whom she and her husband detested as a "good for nothing."[13] Absent this available mitigation evidence, however, the State was free to summarize Brashear's misleading testimony as ordinary discipline, arguing in its closing statement to the jury: "She said his step-father disciplined him. So what? I am sure you have all disciplined your children. I was disciplined

[13] The dissent minimizes this abuse, calling it "no more than spanking." Diss. at 712. We think it safe to say that lifting a baby "up by his two hands with one hand, hold[ing] him up in the air, and wail[ing] on him with her other hand," "beat[ing] the hell out of him" and "while hitting him, yelling[ing] at [him] for being 'just like your father' " goes far, far beyond mere spanking.

myself. I remember trying to run from my mother when I was 16 years old, and she couldn't catch me any more."

Brashear also testified that Pinholster "never really wanted for anything at home too much," having had "everything normally materialwise that most people have," and that although the family "didn't have lots of money," he always had "a roof over his head" and "decent clothes." She even recalled his supposed embarrassment at having friends over to the house because it showed the family's secure financial situation: "[T]he more impoverished people ... that he hung around with, he wouldn't bring them up to the house. He said it was too nice a house and it ruined his image."

As the available mitigation evidence would have shown, however, the truth was that Pinholster and his siblings suffered extreme deprivation. According to additional declaration testimony from Brashear's siblings, the family "remained extremely poor" after Brashear's second marriage, and "[t]he kids did not get enough to eat." Once, Brashear's sister stayed over and awoke in the middle of the night to see "the boys in the kitchen mixing flour with water, trying to make themselves something to eat.... The house was really filthy.... Completely unsupervised," the children "ran wild and trashed wherever they were living.... They ruined apartments, furniture, everything," until the family would "skip out on the rent and move somewhere else," generally to another "bad neighborhood[ ] with lots of crime." All the while, "when it came to spending money, Burnice always spent it on herself first.... Although her kids looked like raga-muffins

and their clothes were always old and dirty, Burnice was always dressed very nicely." Without this evidence before the jury, however, the State was able to argue that Pinholster "came from a good home. You heard that he was not a deprived child. Had many things going for him, probably more than many children."

iii. Family's Criminal and Mental History

Third, with an adequate investigation, Pinholster's trial counsel would have discovered a wealth of evidence regarding his family's significant criminal and mental history. In her testimony, Brashear inaccurately distinguished Pinholster from the rest of his siblings, portraying him as the most wayward of her children by far. She testified that his siblings had been in "small trouble" with the law, and that they were "basically very good children":

> Q: What kind of trouble?
>
> A: My younger son once was picked up on a drunk driving, driving under the influence, which was dropped. I guess he wasn't really as intoxicated as they thought he was. The other was possession of some kind of drug. He got probation and was totally scared, not something you carry around in your car.
>
> Q: How about your daughter? A: She's been in a little bit of trouble, yes. Mostly self-destructive to herself. She was a wild girl. She isn't any more. She got picked up on a drunk arrest also.

When asked, "Generally speaking, was Scott like your other children?," she answered, "No, sir."

The available mitigation evidence would have established, however, that each of Brashear's children had severe problems. When Pinholster's older brother, Alvin, was twenty years old, the State charged him with the rape and sodomy of a fourteen-year-old. He later entered a state mental hospital, where doctors diagnosed him with schizophrenia and determined that he was incompetent to stand trial. After several unsuccessful attempts, Alvin ultimately committed suicide by overdosing on drugs. Pinholster's younger brother, Terry, was diagnosed with mild depression and used drugs, and his half-sister, Tammy, first began drinking when she was eleven. At age seventeen, Tammy was charged with sexual battery and oral copulation on a fourteen-year-old girl. Tammy also had arrests for prostitution, public drunkenness, and possession of marijuana. Guy, a half-brother, who was diagnosed with manic depression and prescribed lithium, was admitted to two different psychiatric hospitals. Gary, another half- brother, had a history of alcoholism and a horrible temper.[14]

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[14] According to relatives' additional declaration testimony, Pinholster's biological father also "did nothing but drink and party," had fits of anger and mood swings, and "sometimes would stay up all night pacing the house, yelling and screaming." After undergoing a mental-health evaluation for a custody hearing, he received a diagnosis as paranoid with narcissistic personality disorder.

iv. Pinholster's Substance Abuse

Fourth, had trial counsel conducted an adequate investigation, they would have discovered evidence of Pinholster's longstanding substance abuse. At the penalty phase, Brashear testified that Pinholster grew up supported by his family, as a member of "a family that sticks close together like you would not believe," and made no mention of his chronic drug problems. According to the additional mitigation evidence, however, the reality was that Pinholster started sniffing glue and paint and using alcohol, nicotine, and marijuana between ages ten and twelve; using secanol, or downers, between ages thirteen and fourteen; and regularly using heroin and sporadically using cocaine between ages fourteen and sixteen. This substance abuse continued into his adulthood.

v. State's Exploitation of Brashear's Testimony

Finally, without any of the additional mitigation evidence, the State was able to capitalize on the weakness of Brashear's testimony in its closing argument:

> What did the defendant proffer in this particular case as to ask you to come back with anything less than death? Not one person, ladies and gentleman, came into this courtroom, not one person, to tell you about anything nice this man has ever done. About anything good in his background, about anything positive that you could consider as being

> something, maybe there is something salvageable. Not one person except his mother. A mother clearly loves her son, ladies and gentleman. Clearly not the most unbiased witness in the world.

The State argued that the defense offered "[n]othing except a mother who loves her son. Even the most heinous person born, even Adolph Hitler probably had a mother who loved him," and that "[i]t would probably be charitable to refer to [Pinholster] as a member of the human species." Given the absence of a minimally adequate defense investigation, these arguments went completely unchallenged, and Pinholster's counsel could only ask the jurors to be merciful, without providing any reason for them to do so. *See Rompilla*, 545 U.S. at 393, 125 S.Ct. 2456 ("This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury....").

Based on the vast differences between Brashear's testimony and the evidence presented at Pinholster's habeas proceedings-as well as on the mitigating effect the additional evidence would have had on the State's aggravation case-we conclude that it was objectively unreasonable for the California Supreme Court to determine summarily that not one of the twelve jurors would have voted against the death penalty. *Wiggins*, 539 U.S. at 537, 123 S.Ct. 2527. We therefore find that counsel's deficient performance prejudiced the defense. *See Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. We find this determination buttressed by the fact that, despite the brevity of defense counsel's penalty phase presentation, the jury deliberated for at least two and

a half days before finally returning a death verdict.

Even more important, we find that application of the controlling precedent in *Porter*, *Terry Williams*, *Wiggins*, and *Rompilla*-as those cases inform the meaning of *Strickland*-admits of no other reasonable conclusion.

In *Porter*, the Court found that counsel had incompetently failed to present evidence of Porter's abusive childhood, alcohol abuse, military service, and brain damage. Porter's father beat his children and wife and, like Pinholster, Porter was his father's "favorite target." *Porter*, at 449. Also like Pinholster, Porter had trouble in school and attended special classes for slow learners. *Id.* Porter joined the military to escape his family life and was honored for fighting in two horrific battles. *Id.* at 454. Upon his return he developed a severe drinking problem and was diagnosed with "brain damage that could manifest in impulsive, violent behavior." *Id.* at 451.

In *Terry Williams*, had counsel conducted an adequate investigation, they would have discovered additional mitigation evidence that "Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings," that "Williams had been severely and repeatedly beaten by his father," and that Williams "had been committed to the custody of the social services bureau for two years." 529 U.S. at 395, 120 S.Ct. 1495. Williams' counsel also would have found that he "was borderline mentally retarded and did not advance beyond sixth grade," that he had "help[ed] to crack a prison drug ring," and that he was a peaceful inmate. 529 U.S. at 396, 120 S.Ct. 1495 (internal quotation marks

omitted). The aggravating evidence, meanwhile, was that before the murder for which Williams received the death penalty, he had been convicted of burglary, armed robbery, and grand larceny, and that after the murder, he had committed "two auto thefts and two separate violent assaults on elderly victims" and "had also been convicted of arson for setting fire in the jail while awaiting trial." *Id.* at 368, 120 S.Ct. 1495.

In *Wiggins*, the available mitigation evidence that competent counsel could have presented was that "Wiggins experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother," that "[h]e suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care," and that he spent a period of time homeless. 539 U.S. at 535, 123 S.Ct. 2527. In addition, Wiggins had "diminished mental capacities." *Id.* The only aggravating evidence, by contrast, was that he drowned his elderly victim in a bathtub and ransacked her apartment; he "d[id] not have a record of violent conduct that could have been introduced." *Id.* at 514, 537, 123 S.Ct. 2527.

Finally, in *Rompilla*, the additional mitigation evidence was that Rompilla "was reared in [a] slum," that his "parents were both severe alcoholics," and that he "was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks." 545 U.S. at 390-92, 125 S.Ct. 2456 (internal quotation marks omitted). This evidence also showed that Rompilla received "no expressions of parental love, affection or approval," that he and his siblings "were not given clothes and attended school in rags," that he drank too much alcohol, that

he "suffer[ed] from organic brain damage," and that his "IQ was in the mentally retarded range." *Id.* at 392-93, 125 S.Ct. 2456 (internal quotation marks omitted). The aggravating evidence, on the other hand, was that Rompilla had prior convictions for burglary, rape, and theft, and that "the murder was committed by torture." *Id.* at 378, 399, 125 S.Ct. 2456; *Rompilla v. Horn*, 355 F.3d 233, 237 (3d Cir.2004), *rev'd by*545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360.

Here, the facts are remarkably similar. Like Porter, Williams, Wiggins, and Rompilla, who were all severely beaten by their parents, Pinholster suffered vicious and repeated physical abuse from both his step-father and his maternal grandmother. All five men grew up deprived in extremely poor households, lacking any meaningful parental guidance or emotional support, and four of them spent parts of their childhood in various foster homes and other institutional environments. While Pinholster, Porter, and Rompilla incurred organic brain damage as children or young adults that impaired their mental health and influenced their behavior, Williams and Wiggins had mental capacities that bordered on or amounted to mental retardation. And Pinholster, Porter, and Rompilla suffered from addictions to alcohol from an early age.

Granted, the aggravating evidence in *Wiggins* and *Porter* was not as strong as that here. Wiggins, unlike Pinholster, lacked a record of violent behavior. Porter was a decorated veteran who returned home a changed man. But the State's aggravation case against Pinholster was not materially stronger than those in *Terry Williams* and *Rompilla*. While it is

true that Pinholster boasted at trial about the many past robberies that he allegedly committed, as noted above, the available mitigation evidence of his brain damage and related mental problems could have influenced the jury's interpretation of that testimony by suggesting an organic origin for his violent, aggressive behavior and for his penchant for exaggeration. Moreover, unlike Pinholster's case, the aggravating evidence in *Terry Williams* included actual convictions for arson, burglary, armed robbery, and grand larceny; Williams's confession to two auto thefts and to two violent assaults on elderly victims, where one of the victims "was[left] in a vegetative state and not expected to recover"; and testimony from two experts that "there was a high probability that Williams would pose a serious continuing threat to society." 529 U.S. at 368-69, 120 S.Ct. 1495 (internal quotation marks omitted). Rompilla likewise had actual convictions of theft, burglary, and-more serious than any of Pinholster's pre-murder crimes-rape, in which he slashed the victim with a knife. *Rompilla*, 545 U.S. at 378, 125 S.Ct. 2456; 355 F.3d at 237. Of even greater importance, however, unlike Pinholster's case, the jury found that Rompilla "committed the murder by means of *torture*." 355 F.3d at 236 (emphasis added).

On the other hand, the facts in Pinholster's case are readily distinguishable from those in *Van Hook*, *Wong v. Belmontes*, and *Visciotti*. Nonetheless, we will discuss them in some detail here because they involved ineffective assistance of counsel and because *Van Hook* and *Belmontes* were decided while this case was pending. In *Van Hook*, the defendant's attorney put vastly more effort into preparing a mitigation case than did Pinholster's. *Van Hook*, 130

S.Ct. at 19. For example, Van Hook's counsel presented eight mitigation witnesses-so many that the court found that additional "evidence from more distant relatives can reasonably be expected to be only cumulative." *Id.* Here, counsel presented one witness, and that witness's testimony was aptly described by the district court as "brief ... damaging, incomplete, and inaccurate." Additional witnesses would not have been cumulative-indeed, they would have directly contradicted the one witness who had been put on the stand, and would have provided the only true mitigating evidence. Van Hook's attorneys also "looked into enlisting a mitigation specialist," *id.* at 18, *presented information about* Van Hook's exposure to domestic violence, drugs, and alcohol at a young age, *id.* at 18, and had experts testify that his mental health problems likely "impaired his ability to refrain from the[crime]" and caused his "explosion of senseless and bizarre brutality," *id.* (internal quotation marks omitted). This is precisely the type of evidence that was kept from Pinholster's jury. Despite the Chief Judge's best efforts to pose the dissent as a reflection of current Supreme Court jurisprudence, *Van Hook* has very little relevance to whether Pinholster's attorneys made reasonable efforts to represent him during the penalty phase of trial.

The recent decision in *Wong v. Belmontes* is also uninstructive in this case. At the outset, the Court was careful to limit the holding by stating that "[t]he challenge confronting Belmontes' lawyer ... was very specific." 558 U.S. ----, 130 S.Ct. 383, --- L.Ed.2d ---- (2009). Substantial evidence (including his own boastful admission) indicated that Belmontes had committed, and escaped punishment for, a previous

murder. *Belmontes*, 130 S.Ct. at 385. The prosecution was desperate to get that evidence in and Belmontes's attorney "built his mitigation strategy around the overriding need to exclude it." *Id.* He had to "proceed cautiously, structuring his mitigation arguments and witnesses to limit" the possibility that he would open the door. *Id.* at 385. Perched on this tightrope, the attorney still managed to "put on nine witnesses that he thought could advance a case for mitigation, without opening the door to the prior murder evidence." *Id.* at 386. If anything, Belmontes's attorney's performance undermines the dissent's argument that Pinholster's one, ineffective mitigation witness was sufficient because his lawyers *may* have feared that other witnesses would have opened the door to some aggravating evidence. Diss. at 718-19. Pinholster had not committed an additional murder just waiting to be revealed, and the record reveals no other such evidence. Nor did Pinholster's counsel assert that any such tactical reason existed for their failure to introduce the crucial mitigation evidence that they failed to uncover.

Belmontes's lawyer showed that putting on an effective mitigation case is possible even in the face of potentially devastating aggravating evidence. The mitigating evidence presented painted a complete picture of Belmontes's past, and the additional evidence that was not presented would have simply been cumulative: that his sister had died when he was young, that he exhibited signs of depression after her death, and that he had a strong, likeable, and respectful character. *Belmontes*, at 385. This evidence starkly contrasts with the unheard evidence in Pinholster's case: organic brain damage, mental

disease, childhood beatings, abandonment, and a nuclear family filled with mental illness and violence. Not only did Pinholster's mother, the one mitigating witness, fail to paint an adequate picture, she downplayed and undermined his story in order to make herself look better on the stand.

Finally, in *Visciotti*, the aggravating evidence was substantially stronger, as Visciotti committed "a cold-blooded execution-style killing of one victim and attempted execution-style killing of another," both after Visciotti and his accomplice had driven the victims to a remote area to rob them. 537 U.S. at 20, 26, 123 S.Ct. 357. Visciotti's prior offenses, which included the "stabbing of a pregnant woman as she lay in bed trying to protect her unborn baby," were shockingly depraved. *Id.* at 26, 123 S.Ct. 357. At the same time, the mitigation evidence in *Visciotti* was significantly weaker than that in Pinholster's case, as Visciotti's "troubled family background" lacked any physical abuse or privation comparable to that suffered by Pinholster as a child. *See id.* (internal quotation marks omitted).

Accordingly, we hold that the California Supreme Court's "postcard" denial of Pinholster's penalty phase ineffective assistance claim constituted an objectively unreasonable application of the clearly established federal law in *Strickland*. Pinholster's attorneys performed even more deficiently than the lawyers in *Terry Williams*, *Wiggins*, and *Rompilla;* and the balance between the available mitigating evidence and the aggravating evidence, for purposes of showing prejudice, is materially indistinguishable from that in *Terry Williams* and *Rompilla*.

We therefore affirm the district court's grant of habeas relief on Pinholster's penalty phase ineffective assistance claim, finding such relief warranted when properly considered under AEDPA's deferential standards. Given the law and the facts discussed above, we are fully persuaded that it was objectively unreasonable for the California Supreme Court to determine summarily that not one of the twelve jurors would have voted against a death sentence, *especially in light of the fact that the jury deliberated for almost two and a half days before finally returning a death verdict.*

In doing so, we in no way minimize the brutal nature of Pinholster's underlying crimes of conviction. As the district court acknowledged, the murders were "heinous." Nevertheless, *Terry Williams, Wiggins,* and *Rompilla* establish that a habeas petitioner's "excruciating life history," *Wiggins,* 539 U.S. at 537, 123 S.Ct. 2527, or "nightmarish childhood," *Terry Williams,* 529 U.S. at 395, 120 S.Ct. 1495, can provide mitigating evidence powerful enough to outweigh the imposition of the death penalty for even the most horrendous of crimes, and that we cannot lightly disregard a capital lawyer's inexcusable failure to find and introduce such evidence.

Our paramount concern is not whether "few death sentences are safe from federal judges," diss. at 685, but rather that federal judges "acknowledge [ ] the uniqueness of the punishment of death [and] 'the corresponding ... need for reliability in the determination that death is the appropriate punishment.' " *McCleskey v. Kemp,* 481 U.S. 279, 340, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) (Brennan, J.,

dissenting) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976)). The guarantees of the United States Constitution, as interpreted by the Supreme Court, apply to our most troubled and our most upstanding citizens alike, and our duty as Article III judges to fairly and impartially apply those guarantees to all citizens compels us to rule as we do today.

IV. CONCLUSION

For the reasons explained above, we AFFIRM the district court's decision upholding Pinholster's conviction but granting habeas relief on his penalty phase ineffective assistance claim. The case is REMANDED for the district court to issue a writ vacating Pinholster's death sentence, unless within a reasonable time set by the court the State conducts a new penalty phase trial or imposes a lesser sentence consistent with applicable law.

AFFIRMED and REMANDED.

Chief Judge KOZINSKI, with whom Judges RYMER and KLEINFELD join, dissenting:

The California Supreme Court *twice* considered Pinholster's claim that his death sentence be set aside because his lawyers performed ineffectively, and twice rejected that claim on the merits. Under AEDPA, those determinations come to us encased in a double layer of deference: first, the substantial deference to which lawyers are entitled under *Strickland* in making judgments during the course of their representation; and, second, the deference to which the state court is entitled in

determining whether the lawyers' performance was ineffective *and* prejudicial. The first layer of deference may be overcome only if counsel's performance was objectively unreasonable under prevailing norms at the time and place of trial. The second layer may be overcome only if the state supreme court's determination is contrary to or an unreasonable application of clearly established Supreme Court authority. Pinholster comes nowhere close to flipping this "doubly deferential" presumption. *Knowles v. Mirzayance*, --- U.S. ----, 129 S.Ct. 1411, 1420, 173 L.Ed.2d 251 (2009).

The majority reaches the contrary conclusion through a series of mistakes that have, unfortunately, become far too common in our circuit. First, the majority relies on evidence never presented to the state courts and that we may therefore not consider in federal habeas proceedings governed by AEDPA. *Contra Williams v. Taylor* (*Michael Williams*), 529 U.S. 420, 437-40, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). Second, the majority applies retrospectively a standard for counsel's performance that bears no relationship to that prevailing in California at the time of Pinholster's trial in 1984. *Contra Bobby v. Van Hook*, --- U.S. ----, 130 S.Ct. 13, 18-19 (2009) (per curiam). Third, and perhaps worst of all, the majority accords no deference to the California Supreme Court's superior expertise in determining what constitutes competent representation among the members of its bar and the likely consequences (or lack thereof) of any deficient performance. *Contra Schriro v. Landrigan*, 550 U.S. 465, 473-74, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007).

Few state court judgments can withstand even

one such error, *see, e.g., Jones v. Ryan*, 583 F.3d 626 (9th Cir.2009); *Libberton v. Ryan*, 583 F.3d 1147 (9th Cir.2009); *Gilley v. Morrow*, 246 Fed.Appx. 519 (9th Cir.2007) (unpublished); *Stankewitz v. Woodford*, 365 F.3d 706 (9th Cir.2004); *see also* cases cited pp. 692, 711 *infra*, but in combination they are deadly. I had hoped that our en banc court would sweep away these mistakes and bring our caselaw into conformity with AEDPA. Instead, the majority repeats and magnifies the errors in these prior cases so that they will be very difficult, probably impossible, for us to correct. This perpetuates a habeas regime where few death sentences are safe from federal judges who know ever so much better than those ignorant state judges and lawyers how capital trials ought to be conducted. Because I don't believe we are the ultimate font of wisdom on such matters, I must dissent.

Background

Following his conviction and sentence, Pinholster (represented by two new lawyers) took a mandatory appeal to the California Supreme Court. In a painfully thorough opinion that takes up 62 pages of the Pacific Reporter, Justice Mosk, writing for a unanimous court, affirmed. *People v. Pinholster*, 1 Cal.4th 865, 4 Cal.Rptr.2d 765, 824 P.2d 571 (1992). One of the numerous issues addressed in that appeal was whether the state had given adequate notice of its intent to present aggravating evidence during the penalty phase. *Id.* at 618-20. The court was thus well aware of Pinholster's claims that his lawyers weren't given notice and failed to ask for a continuance when the trial court offered it. *Id.* at 620.

Leonard Tauman was appointed habeas counsel for Pinholster in February 1990, when the direct appeal was still being briefed. We know that Tauman began his investigation long before the California Supreme Court affirmed the conviction in February 1992, because we have declarations in the record dating back to 1991. Yet Tauman did not file Pinholster's first state habeas petition until August 1993, more than three years after he was appointed. This petition relied on many of the witnesses that were eventually presented in the federal habeas petition, and raised many of the facts the majority now says Pinholster's counsel should have discovered in preparing a mitigation case. The centerpiece of the petition was a report by a psychiatric expert, Dr. Woods, who diagnosed Pinholster as suffering from a mental disease, namely bipolar disorder, and a seizure disorder.

The California Supreme Court did not summarily brush aside this petition. Rather, it ordered that the state show cause why Pinholster ought not be granted relief "on the ground that petitioner received ineffective assistance of counsel [(IAC)] at the penalty phase of trial," in part because of counsel's failure "to ascertain that notice pursuant to Penal Code section 190.3 [of intent to provide aggravating evidence] had been provided and to move for a continuance." [Ex. C-4]* The state responded at

* Because the record is extensive, spanning multiple proceedings in different courts, I offer a legend for the cited sources. "ER" refers to the excerpts of record filed in this court; lettered exhibits, e.g., "Ex. B," are exhibits from the record of state

(continued. .)

length, and Pinholster then filed a traverse. The California Supreme Court thus had extensive evidence and briefing on the central issue in our case and, as demonstrated by its show-cause order, must certainly have focused its attention on the IAC claim. Yet, after seeing it all, in July 1995 the court unanimously denied the petition "on the substantive ground that it is without merit." [Ex. C-7] A majority of the justices also denied various claims (not relevant here) on procedural grounds.

At that point, Tauman took a bow and exited stage left. The scene moved to federal court which, in April 1996, appointed Pinholster his second team of post-conviction lawyers, Michael Snedeker and Michael Abzug (the Michaels). A year later, the Michaels filed Pinholster's federal habeas petition, relying on a new mental health expert named Dr. Stalberg-a psychiatrist who just happened to be the same expert Pinholster's counsel had consulted at trial and who had found Pinholster to be sane and sober on the night of the crime. Dr. Woods, with his discredited theory that Pinholster suffers from bipolar disorder, was jettisoned, never to be seen again.[1]

(...continued)
habeas proceedings; numbered exhibits, e.g., "Ex. 40-1," are exhibits from the federal habeas proceeding; "DT" refers to the transcript of the evidentiary hearing in federal court; "TR" refers to the transcript of Pinholster's original trial in state court; and "CT" is the Clerk's transcript from the original trial in state court.

[1] The reasons for dropping Dr. Woods, who maintains a cottage specialty in diagnosing criminal defendants as psychotic, are obvious. None of the

(continued...)

Because Dr. Stalberg disavowed Dr. Woods's opinion (and vice versa), the parties recognized that the state court had to be given first crack at Dr. Stalberg's evidence. So, pursuant to stipulation, the federal petition was held in abeyance while, in August 1997, the Michaels filed a second habeas petition in the California Supreme Court. Its major difference from the first state petition was the omission of Dr. Woods and the inclusion of Dr. Stalberg, who said that he now saw lots of mitigating evidence that hadn't been brought to his attention when he was consulted at trial. Notably, Dr. Stalberg stopped well short of recanting his diagnosis that petitioner is a sane psychopath.

The state supreme court denied the second petition "on the substantive ground that it is without merit." [Ex. B] In addition, a substantial majority of the justices denied most of the claims on various procedural grounds (that they were untimely, successive or barred by res judicata). This is not surprising, as the second state petition presented nothing new-not even a new psychiatric opinion purporting to absolve Pinholster of moral responsibility for the heinous acts he had committed.

The matter then went back to federal court where it was litigated for four more years, including cross-motions for summary judgment and preparations for an evidentiary hearing (generating over 110 docket entries), all on the assumption that Dr. Stalberg would opine that Pinholster was

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(...continued)
other experts to examine Pinholster on behalf of either side thought much of his diagnosis.

mentally impaired-which Dr. Stalberg would have figured out at trial if Pinholster's lawyers had only provided him with the information habeas counsel dug up. This plan backfired in July 2001 when the state deposed Dr. Stalberg, who testified that none of the new evidence changed his diagnosis that Pinholster does not suffer from a mitigating mental illness. Oops.

Two months later, the Michaels followed Tauman off-stage and the Federal Public Defender's office was substituted as Pinholster's third team of post-conviction lawyers. New counsel fired the radioactive Dr. Stalberg and found two new psychiatric experts (Drs. Olson and Vinogradov) who, in September 2002-18 years after the trial-came up with a diagnosis that Pinholster suffers from a mitigating mental illness: "organic personality syndrome" as a result of head trauma he sustained as a child.

All the while, the district court and the parties labored under the mistaken impression that Pinholster's case was not covered by AEDPA because he had filed his request for counsel and a stay of execution before AEDPA's effective date. *See Calderon v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 163 F.3d 530, 533, 540 (9th Cir.1998) (en banc). The parties proceeded to an evidentiary hearing and the district court made findings while *Calderon* was still law of the circuit. This means that the district court did not limit petitioner to evidence that he first presented in state court, as required by AEDPA 28 U.S.C. § 2254(e); nor did the district court apply AEDPA's standard of substantial deference to state court determinations of law and fact. *See, e.g.*,

Mirzayance, 129 S.Ct. at 1420;*Landrigan*, 550 U.S. at 473-74, 127 S.Ct. 1933;*Yarborough v. Gentry*, 540 U.S. 1, 11, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003) (per curiam); *Woodford v. Visciotti*, 537 U.S. 19, 27, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (per curiam).

As fate would have it, on the very day the district court issued its ruling, the Supreme Court cut the ground from under it by holding that AEDPA *does* apply to cases such as Pinholster's. *Woodford v. Garceau*, 538 U.S. 202, 206-07, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003). Belatedly, the district court filed an order "finding" that petitioner had been diligent in developing the record in the state court, and that he was therefore entitled to present evidence in federal court that he had not presented in state court. The district court also erroneously held that it owed no deference to the state supreme court under AEDPA.

Discussion

A claim that defense counsel in a criminal case was ineffective under *Strickland* calls for an inquiry into whether the lawyer's performance was worse than would have been rendered by minimally competent counsel practicing in the same community at the same time. The Supreme Court has repeatedly cautioned that we must step into that lawyer's shoes before attempting to judge his performance. We can't use hindsight or import standards from a different time and place. Even if we find that a lawyer was incompetent, we may not vacate the conviction unless it's clear that the defendant was actually prejudiced by the lawyer's performance; that is, unless we are convinced there is a reasonable probability that the outcome would have been different.

When AEDPA governs, we are constrained by yet another measure of deference, one that we owe to the state courts which first examined and ruled on the issue. Deference in the IAC context is particularly appropriate because the state courts, and state supreme courts in particular, are most familiar with the type of inquiry we must undertake under *Strickland*. State court judges have an intimate familiarity with the local standards of practice and know far better than federal judges what could reasonably have been expected of competent counsel at the time and place of trial. State courts are also far more likely to understand the behavior of local juries, and thus can best figure out whether a hypothetical strategy, invented by habeas counsel years or decades after the trial, would have changed the outcome.

It is for such reasons AEDPA requires that we defer to the determinations of the state court unless they are *contrary to* or an *unreasonable application of* Supreme Court authority. 28 U.S.C. § 2254(d)(1). This extraordinarily high standard has teeth. *See, e.g., Brown v. Payton*, 544 U.S. 133, 148-49, 125 S.Ct. 1432, 161 L.Ed.2d 334 (2005) (Breyer, J., concurring) ("[T]his is a case in which Congress' instruction to defer to the reasonable conclusions of state-court judges makes a critical difference. Were I a California state judge, I would likely hold that [the] penalty-phase proceedings violated the Eighth Amendment.... Nonetheless, in circumstances like the present, a federal judge must leave in place a state-court decision ...." (citations omitted)). It is not merely a magic spell, the sing-song invocation of which can make the state court's decision disappear

into thin air.

AEDPA limits federal courts in another important way: We may only consider evidence that was first presented to the state courts. 28 U.S.C. § 2254(e). This, too, makes perfect sense: Whether the state court has correctly-or reasonably-interpreted Supreme Court precedent depends on the facts. It makes no sense to say that a state court unreasonably applied clearly established Supreme Court law to facts it didn't know existed. The state court might well have ruled differently had petitioner presented different facts.

Through a pernicious combination of these errors, the majority runs roughshod over the perfectly reasonable determination, twice unanimously made by the state's supreme court, that Pinholster did not suffer prejudicial *Strickland* error. And it does so based on facts Pinholster never presented to the state court. This is nothing like deference.

A. Our review is limited to the record presented in the state habeas petitions

According to the majority, 28 U.S.C. § 2254(e)(2), which requires development of the record in state court, is inapplicable because "Pinholster exercised diligence in pursuing an evidentiary hearing in state court regarding his mitigation ineffective assistance claim. By withdrawing its order to show cause and dismissing Pinholster's habeas petition on the merits, the state court denied Pinholster any further opportunity to develop the factual record in state court." Maj. op. at 668.

The majority double-faults. First, Pinholster has not been diligent in presenting the diagnosis of Drs. Olson and Vinogradov-the two experts on whom he now relies-in his state habeas petitions. If Pinholster's trial counsel could have presented such expert opinions (or any expert opinion to the same effect) at the penalty phase, then Pinholster's habeas counsel could easily have presented such declarations in his first state habeas petition some 9 years after trial. And they certainly should have done so in his second state habeas petition, which was filed 13 years after trial.

Maybe the majority believes that was impossible because Drs. Vinogradov and Olson weren't available. But if not these particular doctors, there must have been *some* doctors who could have come up with the same diagnosis in 1993 or 1997 when Pinholster brought his state habeas petitions. If that was *not* possible, it would destroy Pinholster's claim that his trial counsel were ineffective by failing to come up with a Vinogradov and Olson-like diagnosis in 1984.

Pinholster is thus caught in a finger trap: He cannot claim trial counsel were incompetent in 1984 for failing to do that which diligent habeas counsel didn't do in 1993 or 1997. If competent trial counsel should have come up with this diagnosis at trial, then diligent habeas counsel should easily have come up with it in the state habeas petitions. But if diligent habeas counsel couldn't do it 9 years *after* trial, then trial counsel certainly couldn't have been incompetent in failing to do so *at* trial. The 18 year delay in presenting the diagnosis of "organic personality syndrome" must mean either that habeas

counsel was not diligent or trial counsel was not ineffective. There's no escape.

The majority seems to think that *Michael Williams*, 529 U.S. at 430-32, 120 S.Ct. 1479, *Bradshaw v. Richey*, 546 U.S. 74, 79, 126 S.Ct. 602, 163 L.Ed.2d 407 (2005), and *Holland v. Jackson*, 542 U.S. 649, 652-53, 124 S.Ct. 2736, 159 L.Ed.2d 683 (2004) (per curiam), authorize Pinholster's habeas-by-sandbagging, but they don't. *Michael Williams* excused petitioner's failure to present evidence to the state courts only when "the factual basis of the claims was not reasonably available to petitioner's counsel during state habeas proceedings." *Id.* at 442, 120 S.Ct. 1479. The claim in *Michael Williams* that could not have been presented to the state courts was based on information that only the prosecutor possessed, and petitioner's lawyers couldn't have discovered it until the case got to federal court. *Id.* at 440-43, 120 S.Ct. 1479. By contrast, a different claim, one based on evidence that *was* available to petitioner while in state court-but which he failed to present there-was held precluded. *Id.* at 438-40, 120 S.Ct. 1479.

In our case, nothing prevented Pinholster's counsel from presenting expert declarations with the same diagnosis as Drs. Olson and Vinogradov to the state supreme court. There was no problem with paying for such experts: Petitioner *did* present reports from two other psychiatrists, Drs. Wood and Stalberg, so his lawyers obviously had sufficient funding. *Compare Michael Williams*, 529 U.S. at 442, 120 S.Ct. 1479 (state court denied funding for an investigator). Nor did the state hide anything from Pinholster; his own mental condition was hardly

something the state could have concealed in any event. *Compare id.* at 441-42, 120 S.Ct. 1479. Nor did Pinholster need the court's subpoena power to obtain the expert reports. *Compare id.* at 439-40, 120 S.Ct. 1479. Nor can Pinholster claim that such expert opinions weren't available at the time of the state habeas petitions, because that would make them irrelevant for purposes of evaluating the trial lawyers' performance back in 1984. The reports of Drs. Olson and Vinogradov are just like the evidence in *Michael Williams* that the Supreme Court said couldn't be used because it was not first presented in state court.

Holland and *Bradshaw* help petitioner even less than *Michael Williams.Holland* states bluntly: "In this and related contexts we have made clear that whether a state court's decision was unreasonable must be assessed in light of the record the court had before it." 542 U.S. at 652, 124 S.Ct. 2736 (citing *Yarborough*, 540 U.S. at 6, 124 S.Ct. 1,*Miller-El v. Cockrell*, 537 U.S. 322, 348, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003), and *Bell v. Cone*, 535 U.S. 685, 697 n. 4, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002)). *Bradshaw*, like *Holland*, was another reversal of a court of appeals that had relied on extrinsic evidence without first determining whether the habeas petitioner had been diligent in developing it in state court. We could be next.

But there are two reasons the majority is wrong, not just one. The second is that petitioner hasn't shown he couldn't have returned to state court to present the Vinogradov and Olson evidence. He returned to state court once already after swapping out psychiatric experts. *See* pp. 686-87 *supra*. The

California Supreme Court may not have been thrilled to receive the second petition, but it did decide it on the merits and did not preclude further filings. Pinholster could have gone back-could still go back, so far as we know-to present the evidence from Drs. Vinogradov and Olson to the California Supreme Court. Our case is thus different from *Michael Williams*, where "state postconviction relief was no longer available at the time the [hidden] facts came to light, [and] it would have been futile for petitioner to return to the Virginia courts." 529 U.S. at 444, 120 S.Ct. 1479.

Diligence under *Michael Williams* at least required Pinholster to try to go back to state court and present the expert opinions of Drs. Vinogradov and Olson. By failing either to present his newfangled theories to the state court or to show that such an effort would have been futile, petitioner has indulged in a double dose of non-diligence. Our consideration of his new evidence is clearly barred by section 2254(e)(2).

This is the most dangerous part of the majority opinion as it blots out a key component of AEDPA. The statute was designed to force habeas petitioners to develop their factual claims in state court. *See Michael Williams*, 529 U.S. at 436-37, 120 S.Ct. 1479. The majority now provides a handy-dandy road map for circumventing this requirement: A petitioner can present a weak case to the state court, confident that his showing won't justify an evidentiary hearing. Later, in federal court, he can substitute much stronger evidence and get a district judge to consider it in the first instance, free of any adverse findings the state court might have made. I don't believe that

AEDPA sanctions this bait-and-switch tactic, nor will it long endure.

The majority also says that none of this matters because excluding the two expert reports "would not affect our result." Maj. op. at 669. If the majority means that, it should avoid making such terrible law and reach its result without relying on Pinholster's new psychiatric evidence. But I don't believe the majority does mean it. The majority *must rely heavily on the new experts, see, e.g.,* maj. op. at 661, 675-77, because everything else Pinholster's lawyers managed to dig up-after sifting through the rubble of his life for close to two decades-is so piddling. It's hardly the stuff that would justify finding the state court unreasonable. *See* pp. 709-16 *infra*. The proof is in the pudding: If the expert declarations didn't matter, the majority would leave them out and avoid making an obvious error under *Michael Williams*. That it won't tells us something important.

B. The California Supreme Court did not twice unreasonably apply established Supreme Court precedent in concluding that Pinholster's trial counsel were competent

Strickland v. Washington, which was decided shortly after Pinholster's trial, had a number of important caveats that the majority today seems to have forgotten:

> *No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of*

legitimate decisions regarding how best to represent the criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

...

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac,* 456 U.S. 107, 133-134, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective *at the time.* Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action

> "might be considered sound trial strategy." ...
>
> *The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense.*

466 U.S. 668, 688-90, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (emphases added). More prophetic words have seldom been spoken.

The opinion here illustrates just how far we've strayed from the Court's wise cautions in *Strickland*. Rather than looking to the standards of practice applicable in the community at the time trial was held, we have now adopted a national standard embodied in the ABA Guidelines, which are read rigidly to require a certain kind of investigation and a certain kind of mitigation defense (what is known as "humanizing" the defendant) in every capital case. *Contra Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. No attention is paid to whether these standards reflect the contemporary norms in the community. Rather, current notions of a proper mitigation defense are telescoped back across the decades and retroactively imposed on counsel who had no way of knowing that this is what was expected of them. *Contra id.* This is exactly what the Supreme Court summarily reversed the Sixth Circuit for doing in *Van Hook*: "Judging counsel's conduct in the 1980s on

the basis of [later ABA Guidelines]-without even pausing to consider whether they reflected the prevailing professional practice at the time of the trial-was," the Court held, "error." *Van Hook*, at 17. It's the same error the majority commits today.

Also contrary to *Strickland*, the majority pays hardly any attention to the facts and circumstances of this particular case, or the reasons Pinholster's counsel may have had for proceeding as they did. *Strickland*'s twice-iterated caution that "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," *id.* at 690, 104 S.Ct. 2052, is stitched into window dressing; the "strong presumption" is treated like the cantankerous relative who gets an occasional Christmas card but is never invited to dinner.

Perhaps most troubling is our total disregard of *Strickland*'s admonition that we not interfere with the independence of counsel and the latitude they must have in making tactical decisions. 466 U.S. at 688-89, 104 S.Ct. 2052. The current infatuation with "humanizing" the defendant as the be-all and end-all of mitigation disregards the possibility that this may be the wrong tactic in some cases because experienced lawyers conclude that the jury simply won't buy it. Not all defendants are capable of rehabilitation, and not all juries are susceptible to such a plea. Counsel, who are in the courtroom and can observe the jurors and their reaction to various witnesses (including the defendant), may have good reason for pursuing other avenues of mitigation, such as sympathy for the defendant's family.

According to our case law, as amplified by today's opinion, any trial lawyer who fails to worship at the altar of "humanization," will be labeled an incompetent boob by later counsel and federal judges who all think they know how to represent the capital defendant better than his own trial lawyers. No self-respecting lawyer wants to be berated in a published opinion-as today's opinion does to Pinholster's trial counsel-so their self-interest will cause them to pursue the safe course for themselves rather than the course that best serves the client's interests. Current and future capital defendants will pay with *their* lives for preserving Pinholster's. *Cf. Van Hook,* at 17.

The majority's methodology, which reflects the received wisdom in our court, has become an unstoppable engine for setting aside death sentences. *See, e.g., Hamilton v. Ayers,* 583 F.3d 1100, 1118 (9th Cir.2009) (requiring counsel to retain a mental health expert); *Belmontes v. Ayers,* 529 F.3d 834, 857-58 (9th Cir.2008) (requiring counsel not merely to investigate mitigating mental health evidence, but to present it), *rev'd sub nom., Wong v. Belmontes,* 558 U.S. ----, 130 S.Ct. 383, --- L.Ed.2d ---- (2009) (per curiam); *Lambright v. Schriro,* 490 F.3d 1103, 1119 (9th Cir.2007) (requiring counsel to "humanize" the defendant at sentencing). These cases, like the majority here, systematically fail to take *Strickland* seriously. That *Belmontes* was unanimously-and unceremoniously-reversed seems to have made no impression around here.

1. The Standard of Care. Petitioner has presented no evidence as to the standard of professional competence in capital cases that prevailed in Los Angeles in 1984. Rather, he relies

on-and the majority accepts-the ABA Guidelines as the governing standard. The Supreme Court disagrees with this approach: "Restatements of professional standards ... can be useful as 'guides' to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place." *Van Hook*, at 16. For the ABA Guidelines to be relevant, they "must reflect prevailing norms of practice and standard practice." *Id.* at 17 n. 1 (internal quotation marks, alterations and citations omitted). Pinholster, who has the burden of proof, offers no evidence that the 1982 ABA Guidelines meet this standard for a capital trial in Los Angeles in 1984.

Moreover, at the time of Pinholster's trial, the ABA had no guidelines specifically applicable to capital cases (those didn't come about until 1989), and the guidelines pertaining to criminal cases were quite general. They certainly did not impose anything like the straightjacket the majority retroactively imposes on counsel today. The most relevant portion of the 1982 Guidelines consists of a single sentence buried in a paragraph of "Commentary." This sentence does no more than point out that various aspects of the defendant's background "will be relevant" to an effective defense. That's a far cry from a commandment that lawyers leave no stone unturned when investigating the defendant's background. As the Court recently explained:

> The ABA standards in effect in 1985 described defense counsel's duty to investigate both the merits and mitigating circumstances in general terms.... Quite different are the ABA's

> 131-page "Guidelines" for capital defense counsel.... Those directives expanded what had been (in the 1980 Standards) a broad outline of defense counsel's duties in all criminal cases into detailed prescriptions for legal representation of capital defendants.

Van Hook, at 17. The Court here was discussing the version of the guidelines in effect during Pinholster's trial, which occurred about a year before Van Hook's.

The Supreme Court, our court and the California Supreme Court have all held that competent counsel need not, and often will not, exhaust every avenue of investigation. *Strickland* itself held that counsel need not conduct an exhaustive investigation of a defendant's background. Instead, counsel only has "a duty to make reasonable investigations *or to make a reasonable decision that makes particular investigations unnecessary.*" 466 U.S. at 691, 104 S.Ct. 2052 (emphasis added). "[T]here comes a point at which evidence ... can reasonably be expected to be only cumulative, and the search for it distractive from more important duties." *Van Hook*, at 19. At least in 1984, counsel was only required to "cover several broad categories of mitigating evidence," *id.*, something Pinholster's trial counsel did by any measure.

Van Hook is only the latest in a long line of similar cases. *Burger v. Kemp* noted that "[t]he record at the habeas corpus hearing does suggest that [counsel] could well have made a more thorough investigation than he did," but the Court held he

wasn't required to. 483 U.S. 776, 794, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987). We follow a slightly stricter rule: "[C]ounsel is not deficient for failing to find mitigating evidence if, after a reasonable investigation, nothing has put the counsel on notice of the existence of that evidence"-but even we acknowledge there is some limit on counsel's duty to investigate. *Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir.1998) (internal quotation marks omitted). The California Supreme Court is of the same mind. *See, e.g., In re Ross*, 10 Cal.4th 184, 40 Cal.Rptr.2d 544, 892 P.2d 1287, 1304-05 (1995) (collecting cases).

Instead of rehashing the ABA Guidelines, the majority should be asking whether the investigation by Pinholster's counsel comported with the standards for counsel in a capital case in California in the mid-1980s. *Van Hook*, at 15. The clearest evidence that it did comes from *Hendricks v. Calderon*, a capital case where we discussed the standard of care prevailing in California around the time of Pinholster's trial:

> Hendricks argues "that by 1981 [the time of trial] it was the recognized duty of defense counsel in capital cases to obtain social history evidence relevant to a client's mental condition where there was an indication of mental disturbance and to provide such evidence to an expert in order for the client's condition to be properly evaluated." *Under Hendricks' 1995 view, Berman was duty bound to interview Hendricks' family members and friends, to obtain medical, school, and employment records, to otherwise verify*

> *Hendricks' autobiography and pass this information on to his mental health experts.* "Without such background material," Hendricks continues, "the expert's diagnosis of the client's condition could not be meaningful." Hendricks' argument, then, is not that examination by two mental health experts was per se inadequate. Rather, Hendricks argues that trial counsel had a duty to provide the experts with his client's family social history, even absent any request from the experts. He argues that counsel's failure to do so undermines the expert's conclusions to such an extent that they cannot provide an adequate basis on which the attorney could make strategic choices.
>
> *Neither reason nor the existing authority would lead one to conclude that an attorney in 1980 had such an affirmative constitutional duty.*

70 F.3d 1032, 1038 (9th Cir.1995) (emphasis added). The state relied on *Hendricks* as proof of the standard of care in its brief before us and in the district court.

Pinholster asks us to adopt a different standard of care based on the ABA Guidelines, but the *Hendricks* panel, writing in 1995-just about the time the California Supreme Court was ruling on Pinholster's state habeas petitions-specifically *rejected* Pinholster's interpretation of those guidelines:

Certainly, in 1981, Hendricks' attorneys did not believe they had any duty to investigate Hendricks' social history in the face of the unanimous opinions of their own experts that there was no basis for a mental defense.

The legal authority Hendricks cites offers meager support for his argument. Hendricks' cited authority merely discusses the basic duty under *Strickland* to investigate potential defenses before making strategic decisions. *See* ABA Standards Relating to the Administration of Criminal Justice, Standard 4-4.1; *U.S. v. DeCoster*, 487 F.2d 1197 (D.C.Cir.1973); *Rummel v. Estelle*, 590 F.2d 103 (5th Cir.1979). Hendricks' authority that touches upon the duty to investigate mental defenses for the most part deals with an attorney's failure to investigate the possibility of a mental defense. *See People v. Frierson*, 25 Cal.3d 142, 162, 158 Cal.Rptr. 281, 599 P.2d 587 (1979); *People v. Pope*, 23 Cal.3d 412, 428, 152 Cal.Rptr. 732, 590 P.2d 859 (1979); *Deutscher v. Whitley*, 884 F.2d at 1160. At most, these cases establish a duty to seek out psychiatric evaluation of a client where the grounds of a mental defense are apparent, a duty Berman clearly discharged. Hendricks' cases make no comment on an attorney's alleged duty to investigate material relevant to a mental defense in the face

> of expert advice that there is no basis for such a defense. *See also Evans v. Lewis*, 855 F.2d 631, 637 (9th Cir.1988) (failure to investigate defendant's mental condition when there is evidence of impairment constitutes deficient performance, and is prejudicial when it hampers later presentation of evidence of mental impairment).

Hendricks, 70 F.3d at 1039.

Since our own court, considering the very issue only 11 years after Pinholster's trial, said that no such duty existed in California at the time, how can we now-a quarter century removed from the trial and with no evidence on point-say that such a duty *did* exist after all? More, how can we say in 2009 that the California Supreme Court in the mid-1990s unreasonably applied established Supreme Court precedent by rejecting a standard of professional competence that we unanimously held *at the same time* did not apply to counsel in the 1980s?

The majority reaches its unjustified conclusion by misreading three oft-invoked and oft-misinterpreted Supreme Court cases: *Williams v. Taylor* (*Terry Williams*), 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), and *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). My colleagues seem to think that these opinions create a nationwide, retroactive code of professional conduct for capital cases. (Never mind that *Strickland* says, and *Van Hook* confirms, there's no such thing.) The majority's exegesis on these cases

is but one more in a series of inapt methodologies that this en banc court should have put to rest.

Terry Williams has little to say about the source or scope of the standard for professional competence in capital cases. While it cites the ABA Guidelines in passing, 529 U.S. at 396, 120 S.Ct. 1495, there was no real dispute that counsel there had been ineffective. The same state trial judge who sentenced Williams concluded that counsel's performance was deficient, *id.* at 370, 120 S.Ct. 1495, a conclusion the Virginia Supreme Court accepted and that the State "barely disputed" before the U.S. Supreme Court. *Id.* at 395, 120 S.Ct. 1495. There was evidence, as there is not in this case, that counsel's performance did not comport with the standard of care in the community at the time and place of trial.

The only real dispute in *Terry Williams* was whether the state court had properly applied the prejudice prong of *Strickland*. The Virginia Supreme Court wrongly believed that *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), modified *Strickland* 's prejudice inquiry, and the U.S. Supreme Court set it straight. Insofar as the Supreme Court passed on the competency of counsel, it was to confirm the state court's judgment, not overrule it as unreasonable. *Terry Williams* has nothing to say about the standard under AEDPA when the state court finds the lawyer has been competent and the federal court disagrees.

Wiggins is hardly better for Pinholster. First, the trial judge there "observed from the bench that he could not remember a capital case in which counsel had not compiled a social history of the

defendant, explaining, '[n]ot to do a social history, at least to see what you have got, to me is absolute error.' " *Wiggins,* 539 U.S. at 517, 123 S.Ct. 2527. Thus, the *Wiggins* Court had a finding by a state judge who was experienced in local practices that Wiggins' lawyer had performed incompetently. The Supreme Court expressly relied on this time- and place-specific determination: "As [the trial judge] acknowledged, standard practice in Maryland in capital cases at the time of Wiggins' trial included the preparation of a social history report." *Id.* at 524, 123 S.Ct. 2527.

Second, insofar as the ABA Guidelines are relevant, Wiggins' trial took place after the ABA issued its 1989 Guidelines providing specific standards for capital cases, and it is *that* version of the ABA Guidelines on which the *Wiggins* Court relied. But the 1989 Guidelines are far *more* mandatory and specific than the 1982 Guidelines that were in force at the time of Pinholster's trial. Whereas the 1982 Guidelines contained only a single sentence in the "Commentary," pointing out certain types of inquiries that "will be relevant" in all criminal cases, the 1989 Guidelines outline capital counsel's affirmative duties at some length, including an investigation that " 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.' " 539 U.S. at 524, 123 S.Ct. 2527 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C) (1989)) (emphasis added by the Court). Although I doubt that *Wiggins* turned the ABA Guidelines into a constitutional code of conduct for lawyers, *see Van Hook,* at 17 & n.1, even if I'm

wrong, it's irrelevant; in *Wiggins* a newer, more exacting edition of the guidelines applied and those standards cannot be ported back to Pinholster's case.

Finally, there's *Rompilla*, which says nothing about the general scope of investigation required for defense counsel in capital cases. The *Rompilla* majority found a single flaw in defense counsel's performance, namely the failure to examine the case file of a prior conviction that counsel knew the prosecution would rely on in aggravation, 545 U.S. at 383, 387-90, 125 S.Ct. 2456, a point emphasized in Justice O'Connor's linchpin concurrence. *Id.* at 393-94, 125 S.Ct. 2456. And Justice O'Connor saw no need to cite the ABA Guidelines at all. *Rompilla* 's holding does not support the view, adopted by the majority here and by a number of other recent cases, that some version of the ABA Guidelines is the minimum standard of practice the Constitution imposes on all 50 States. I would be surprised to learn that the Supreme Court in *Rompilla* had meant to give the ABA the constitutional authority to set the standard of care for all criminal cases across the nation. And I wouldn't be alone. *See Van Hook*, at 15 (Alito, J., concurring).

Terry Williams, *Wiggins* and *Rompilla* rely on the ABA Guidelines as background support where they overlap with local standards (*Terry Williams* and *Wiggins*) or where the proposition is so obvious that it's a matter of common sense (*Rompilla*).*See Van Hook*, at 17. These cases don't establish the ABA as the final authority on how lawyers must conduct criminal trials, with the power to override contrary determinations by the state courts about the lawyers they admit to practice. And yet the majority relies

entirely on the ABA Guidelines without any evidence that the Guidelines reflect local standards in the community at the time of Pinholster's trial. This is what the Sixth Circuit got summarily reversed for in *Van Hook*.

Here we have more than petitioner's failure of proof. We have evidence going the other way: a determination by our court in *Hendricks* and other cases, *see* p. 709 *infra*, that the duty to investigate at the time was *not* what petitioner now claims it to be. This is *Van Hook* on stilts.

2. The Facts of This Case. Justice O'Connor's concurrence in *Rompilla* emphasized "our longstanding case-by-case approach to determining whether an attorney's performance was unconstitutionally deficient under *Strickland*." 545 U.S. at 394, 125 S.Ct. 2456. The majority here does very little to determine what competent counsel could realistically have done to help Pinholster at the penalty phase. Not even lip service is paid to the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. Rather, the majority is satisfied with pointing out that counsel were surprised by the need to put on mitigation evidence, that they turned down an offered continuance and that they "billed a total of only 6.5 hours in preparation for the penalty phase of the trial." Maj. op. at 711 (footnote omitted). The majority is wrong on all counts.

I might as well start with the most obvious error. The "only 6.5 hours" has been brandished by petitioner's able habeas counsel like a smoking gun:

concrete proof that Pinholster's trial lawyers must have been incompetent because they spent less than a work-day preparing for such an important hearing. Problem is, the "only 6.5 hours" is a myth.[2]

The 6.5 hour figure comes from the time records of Brainard, who was just one of Pinholster's trial lawyers, and includes only time that bore the notation "prep. for penalty phase." *See* Maj. op. at 658 n.2. But the defense team clearly spent a lot more time on mitigation. Under California law, the prosecution didn't have to put on penalty-phase evidence at all in order to ask for the death penalty; it could have relied entirely on the evidence presented during the guilt phase. Thus, it doesn't matter whether the prosecution has given, or the defense has received, notice of an aggravation hearing. In preparing for trial, counsel in California must necessarily consider both guilt and penalty, and try to work as much mitigation evidence as possible into the guilt phase.

Pinholster's trial counsel did precisely this. They put on Pinholster's brother, Terry, to support his alibi defense, but also elicited from him the following mitigation evidence: (1) that Pinholster "was more or less in institutions all his life" [TR 6015]; (2) that Pinholster suffered from epilepsy and Terry had seen him have two seizures in a single evening [TR 6015-18, 6031-32]; and (3) that Pinholster was drunk on the night of the murders.

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[2] Building such mythology appears to be one of the tools of the trade for habeas counsel. *See Van Hook*, at 15. There must be a CLE course by that name.

[TR 6036]

Terry was examined at trial by Brainard, and Brainard must have prepped him or he couldn't have learned about those mitigating facts to begin with. Yet an examination of Brainard's time records makes no mention of speaking to Terry, and certainly doesn't say that this was time spent on mitigation.

It is possible that the prep work on Terry was done by Dettmar, Pinholster's other trial counsel, or that it was included in one of Brainard's more cryptic notations, such as "Interviewing defense witnesses" (3/28/84), "Brainard & Dettmar interview of witness" (3/6/84) or "Brainard & Dettmar interview with" (3/7/84). [Ex. 71-2] Or, perhaps Brainard was not diligent about time records. One way or the other, some of the time spent preparing Terry must be counted as time counsel spent on mitigation and the 6.5 hours, all of which were spent after Terry testified, obviously don't include that.

There are other hours logged on Brainard's time sheets that were clearly devoted to mitigation. For example, on February 23, 1984, he billed for "Conf. with Burnice Brashear, Pinholster's mother," and two days later for "Research re; epilepsy and conf. with nurse." [Ex. 71-2] There was nothing Burnice could have possibly said about the crime, so the time spent with her must have been entirely on mitigation. The time spent on epilepsy was also obviously mitigation-related. Brainard's time records show that he spent about 700 hours on Pinholster's case and much of that time is described in fairly general terms. Just because there were only 6.5 hours that he specifically described as preparation

for the penalty phase doesn't mean that's all the time he spent on mitigation.

The majority claims that Pinholster's counsel admitted "that they spent almost no time preparing for the penalty phase hearing," maj. op. at 671,[3] but I've found no such admission in this very hefty record. Nor is the majority right in claiming that "[b]illing records confirm" such an admission. The only time sheets and declarations they reference are Brainard's. Maj. op. at 658 n.2, 671. Yet, according to Brainard, it was Dettmar who was primarily in charge of the penalty phase. [ER 182, 337, 350, SER 122] We don't have a complete set of Dettmar's time records; we have only those through March 15, 1984, which does not include the 8-week period leading up to and including the penalty phase, when Dettmar most likely would have been preparing for that portion of the trial. What we do have of Dettmar's time sheets indicates that he spent considerable time preparing for mitigation.

Thus, on January 13, 1984, we have the notation "phone call to defendant's mother re medical history"; on February 21 there is "Penal Code research on capital punishment"; on February 23

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[3] In the same paragraph, the majority states: "One week before the penalty hearing, counsel told the judge that they 'did not prepare a case in mitigation' because they 'felt there would be no penalty phase hearing.' " Maj. op. at 671. These statements are not from the transcript of Pinholster's trial. What the majority is quoting are Brainard's self-inculpatory declarations, dozens of which he dutifully signed seven years after the trial. *See* pp. 700-01 & nn. 6-9 *infra*.

there is "conference with defendant's mother re childhood problems"; on February 25 there is "Research on Pen. C. 190.3";[4] on February 29, there are notations for various mitigation-related items, including "Further research on Pen. C. 190.3" and "Phone call to appointed psychiatrist." On February 26, Dettmar spent six hours on "preparation argument, *death penalty phase*" (emphasis added).

There are other, more cryptic notations that might or might not go to mitigation, such as "Visit to client, L.A. County Jail" (February 10), but such as we have of Dettmar's time sheets shows that the defense team was keenly aware of the need to show mitigation and was vigorously investigating mitigation evidence. Dettmar's time records stop abruptly on March 15, 1984, which was in the midst of the guilt phase, so we don't know what else he did to prepare for the "death penalty phase," but we do know he was active because he made further court appearances and his name is referenced in Brainard's time sheets.

For all we know, Dettmar did just about everything Pinholster claims should have been done on his behalf, like examining his medical and school records, talking to school authorities, prison guards, friends and neighbors, all in a vain effort to find someone who would say a good word about him. We know that Dettmar was the contact point for Dr. Stalberg, the defense team's psychiatrist, and that Dettmar provided him with the information the doctor used in forming his diagnosis. (Dr. Stalberg's

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[4] Penal Code § 190.3 deals with mitigation in capital cases.

opinion letter is addressed to Dettmar, and Dr. Stalberg mentions in his declaration that his dealings were with Dettmar.) This activity clearly went to mitigation, yet (except for a phone call on February 29) the time spent is not accounted for on any time-sheet Pinholster has supplied. There is no lawyer's case file documenting the activity, and there's no testimony about it; we know virtually nothing about it. Dettmar's activities in the two months leading up to and including the penalty phase are a complete blank. There may be mitigation-related activities about which we know nothing at all.

Which brings us back to the burden of proof, which rests on petitioner, and the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052. Pinholster fails to shoulder his heavy burden of overcoming that presumption. Inasmuch as Pinholster has been unwilling or unable to document the actions of half his trial team during a crucial two months in the proceedings, he has failed to carry the ordinary burden of any habeas petitioner. And he certainly comes nowhere near carrying the especially heavy burden in ineffectiveness cases, where he must overcome the "strong presumption" that counsel were diligent and competent in advancing his interests.

We know, based on the documentation we do have, that the lawyers engaged in activities that were highly relevant to mitigation, such as retaining a psychiatrist who examined Pinholster, talking to the defendant's mother and brother and educating themselves about epilepsy. We also know from

Dettmar's time sheets that he was preparing for the "death penalty phase" as early as February. *See* 698 *supra*. It therefore isn't remotely consistent with the record and the "strong presumption" to say, as the majority does, that Pinholster's trial team spent "less than an average workday" preparing for the penalty phase. Maj. op. at 672.

Petitioner bears the burden of proof, so if he wants to claim that his lawyers didn't spend enough time on mitigation, he must account for all the time they did spend before we can say they didn't spend enough. It's not fair-or consistent with AEDPA-for petitioner to present partial time records for the first time in federal court, p. 698 *supra*; p. 700 n. 6 *infra*, and then claim-Tada!-my lawyers only spent 6.5 hours on mitigation. This gambit didn't work in *Van Hook*, 130 S.Ct. at 15, and it shouldn't work here.

In addition to the supposedly short time Pinholster's defense team spent on mitigation, the majority's other "proof" that his lawyers must have been incompetent is the fact that they were taken by surprise at the end of trial when they learned there would be a penalty phase and yet refused a continuance offered to them by the trial court.[5] The

[5] I'll assume, like the majority, that the lawyers were in fact surprised that the state planned to put on aggravation evidence at the penalty phase, but the record can also be construed otherwise. As noted, Dettmar's time records show him billing for the "death penalty phase" as far back as February. Brainard too has a notation in his time records, "Start prep. for penalty phase" on April 11, two weeks before the defense team was supposedly surprised that the prosecution planned to put on

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decision to decline a continuance only seems incompetent if the defense lawyers hadn't already conducted an adequate investigation into mitigation. But if they had been looking for mitigation evidence all along, they would already have decided what mitigation strategy to pursue. And if their decision was to present only Pinholster's mother in mitigation, then turning down a continuance was perfectly reasonable; "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052.

The record is clear that the defense team was quite busy preparing mitigation evidence, and specifically preparing for the capital penalty phase, long before the jury came back with a guilty verdict. We know that they consulted a psychiatrist, but only after the trial started, suggesting that his testimony wasn't intended for guilt-phase issues (which involved an alibi defense), but for mitigation. They talked to the mother about his emotional problems and medical history, and they educated themselves on epilepsy, all matters not relevant to the alibi defense. Pinholster's lawyers clearly investigated the "several broad categories of mitigating evidence" they should have considered. *Van Hook*, at 19. They were required to do no more than that.

For all we know, this is just the tip of the

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aggravation evidence. Maj. op. at 16051 n.2. If the defense lawyers truly had no idea there would be a penalty phase, why were both of them billing time as preparing for it?

iceberg of what the defense team did in pursuing mitigation evidence since Dettmar's time records for the crucial period from March 15 until the end of trial are missing. Dettmar's case file is also missing, which could have given us pretty good insight into the activities of Pinholster's "death penalty phase" lawyer as the defense team was in full swing preparing for the penalty phase. Dettmar was dead by the time of the first habeas petition, so we have no statements from him, but his case file would almost certainly still have been in existence at the time Pinholster's first habeas lawyer commenced his investigations. Yet there is no explanation for why the case file wasn't retrieved and presented in the state habeas petition. Most likely it's because Pinholster's first two habeas teams didn't pursue this line of inquiry; even Brainard's time records were never presented to the state courts.[6]

In the absence of any evidence as to what the defense team, and particularly Dettmar, actually did in investigating mitigation evidence, the majority relies on a series of non-denial denials[7] from

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[6] Which means we shouldn't be considering the time records at all because Pinholster was not diligent in presenting them to the state courts. *See* pp. 689-91 *supra*. Nor did he raise the "only 6.5 hours" argument in his state petitions. Had he done so, I doubt the state judges would have been gulled by the bogus "only 6.5 hours" figure.

[7] Non-denial denial is a phrase that became popular in the wake

> of the Watergate scandal, referring to an equivocal denial, particularly one made by an official to the press. London's *The*

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Pinholster's surviving counsel, Brainard. Maj. op. at 658. These statements, stamped out by the dozen at the behest of habeas counsel 7 years after the trial, seem to say a great deal but, in fact, say nothing at all. Thus, Brainard had "no recollection" that Dettmar had reviewed any medical or school records; he did "not recall" interviewing or attempting to interview family members or any other persons regarding penalty phase testimony; he had "no recollection of seeing or attempting to secure Scott's school records." Within a single paragraph the majority quotes Brainard as not recollecting or having no recollection or stating "so far as[he] recollect[ed]" no fewer than 5 times. Maj. op. at 658 (second alteration in original).[8] There is not a single

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> *Sunday Times* has defined it as "an on-the-record statement, usually made by a politician, repudiating a journalist's story, but in such a way as to leave open the possibility that it is actually true."

A "*non-denial denial*" is a statement that seems direct, clearcut and unambiguous at first hearing, but when carefully parsed is revealed not to be a denial at all, and is thus not untruthful. It is a case in which words that are literally true are used to convey a false impression; analysis of whether or when such behavior constitutes lying is a long-standing issue in ethics.

Wikipedia, *Non-denial denial*, http:// en. wikipedia. org/ wiki/ Non- denial_ denial (last visited November 22, 2009).

[8] The majority doesn't quote it, but Brainard also did not recall why he failed to ask for a continuance when the trial court offered it. **[ER 367]**

categorical statement attesting that Brainard and Dettmar failed to do any of these things.

Failure to recall can be very useful because it avoids the risk of contradiction or perjury. Who, after all, can dispute that someone else doesn't recall something? But when evidence is needed to carry the burden of proof, a lack of recollection is worth absolutely nothing. Indeed, a failure to recall does not even satisfy the burden of production, because it does not prove or disprove the fact not recalled.[9] Brainard's accommodating statements, no doubt made to try to help a former client, prove zilch. *See also* pp. 700-01 n.5 *supra*.[10]

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[9] The majority is right that Brainard's failure to recall also doesn't prove he *did* perform a reasonable investigation, maj. op. at 671, but it doesn't matter because the state need not prove that counsel performed a reasonable investigation. It is petitioner who must prove the opposite. Porter met this burden through the affirmative statements of his only trial counsel. *Porter v. Crosby*, 2007 WL 1747316, at *2, 25 (M.D.Fla.2007). Pinholster has no evidence at all from one of his lawyers and the other one doesn't remember.

[10] Brainard's forgetfulness is just another example of counsel "falling on his sword," something trial counsel are known to do to help their clients on habeas. *See, e.g., LaGrand v. Stewart*, 133 F.3d 1253, 1276 (9th Cir.1998); *Hendricks*, 70 F.3d at 1039. Because counsel usually suffer few if any consequences for being found ineffective, many see no harm in this tactic; some may even see it as their duty. *See generally* Lawrence J. Fox, *Making the Last*

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If we assume, as the majority plainly does, that Pinholster's trial lawyers couldn't walk and chew gum at the same time, then no degree of idiocy on their part would surprise us. But we must indulge in the contrary "strong presumption that [they made choices] for tactical reasons rather than through sheer neglect." *Yarborough*, 540 U.S. at 8, 124 S.Ct. 1 (citing *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052). What this means for us is that we must presume, consistent with the time records we do have, that Pinholster's trial lawyers were fully aware that they would have to deal with mitigation sometime during the course of the trial, did spend considerable time and effort investigating avenues for mitigation and made a reasoned professional judgment that the best way to serve their client would be to rely on the fact that they never got notice and hope the judge would bar the state from putting on their aggravation witnesses. Nevertheless, the time sheets show that both lawyers were busy preparing for the penalty phase long before they supposedly knew for sure there would be a penalty phase hearing. [CT 798, 844, 864, 1160]

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Chance Meaningful: Predecessor Counsel's Ethical Duty to the Capital Defendant, 31 Hofstra L.Rev. 1181 (2003). Laudable or not, this tendency on the part of counsel seriously distorts our ineffective assistance jurisprudence; competent counsel are found ineffective because they effectively concede the point. Our jurisprudence then fills up with descriptions of perfectly adequate performance that is assumed to be deficient.

Had this strategy succeeded, it would have been quite a coup. It almost *did* succeed; the trial judge had to think long and hard before ruling against the defense's motion to preclude aggravation evidence, and the California Supreme Court had to work hard to affirm. *Pinholster,* 4 Cal.Rptr.2d 765, 824 P.2d at 618-20. We'll never know, of course, but the burden of proof, *Strickland* 's presumption of competence and AEDPA deference each require us to presume that the lawyers did the smart thing, not the dumb one.

The fact that Pinholster's lawyers tried to bar the state from putting on aggravation evidence does not mean they were not also preparing for the alternate possibility; their time sheets (such as we have) clearly show they were. This would explain why, when offered a continuance, the defense chose not to accept the offer. They had already done the necessary investigation and knew how they were going to proceed. If we "strongly presume," as *Strickland* commands, that the defense lawyers were competent, then they would have had no need for a continuance because they had already considered all the available possibilities and concluded that the best strategy was to put only Pinholster's mother on the stand.

This obviously isn't a view shared by the majority here, but that's because my colleagues view the case through the "distorting lens of hindsight." *Sims v. Brown,* 425 F.3d 560, 585 (9th Cir.2005) (internal quotation marks omitted); *Turner v. Calderon,* 281 F.3d 851, 873 (9th Cir.2002) (internal quotation marks omitted); *Hendricks,* 70 F.3d at 1036. If we step into the defense lawyers' shoes and

look at the case from ground zero, the decision to rely on Pinholster's mother is entirely plausible, perhaps inevitable. It was certainly plausible enough that the California Supreme Court didn't *unreasonably* apply Supreme Court precedent by determining the lawyers were competent.

The majority seems to overlook the very difficult position defense counsel found themselves in after the jury came back with guilty. This wasn't a case where defendant sat doe-eyed at counsels' table looking sad and contrite while others spoke for him. Instead, he took the stand and protested his innocence aggressively and at length. While we don't have video of Pinholster's testimony, the transcript gives strong indications that he was arrogant to the point of smirking at the prosecution's questions. Equally important, the transcript reveals that he was lucid and entirely coherent. He presented himself as a violent and highly aggressive criminal. He claimed that he used only guns but then had to admit he had used knives in other crimes. He tried to snow the jury about his whereabouts on the night of the crime, but the jurors were not taken in. During the hour or two he testified, Pinholster doubtless made a deep impression on the jury and this would have made it difficult or impossible to "humanize" him in their eyes. Brainard and Dettmar were there to see all of this and their mitigation strategy was constrained by this reality. My colleagues see only a paper record.

Trial counsel were limited in their choices in other significant ways. They had hired a competent psychiatric expert, Dr. Stalberg, and his opinion was devastating:

1. *When examined, Mr. Pinholster did not manifest any significant signs or symptoms of mental disorder or defect other than his antisocial personality disorder by history.* Although he allegedly has epilepsy, he has not been taking medication for the past year at County Jail and has not had a seizure. *Additionally, it does not appear that he suffers brain damage as he was cognitively intact on mental status examination.*

He has a history of hyperactivity as a youngster and hospitalization at Camarillo State Hospital at the age of 14 for incorrigibility. He was not medicated there and just received 90 day observation. He spent time in the Youth Authority and in various state prisons without requiring psychiatric treatment or medication.

He has a lengthy history of drug dependency of the narcotic variety, but *his drug dependency has not resulted in any brain damage.*

2. As for the alleged offenses, the defendant denies any involvement other than directing an individual to burglarize the residence with Mr. Pinholster collecting 1/3 of the money from sale of the stolen loot. *He is able to describe his actions on the night in question in great detail,* omitting of

course any direct involvement with the victims. *It would not appear therefore he was significantly intoxicated or impaired on the night in question.*

Additionally, considering the statements attributed to the defendant by witnesses, it would also appear he was fully aware of what he was doing at the time of the offenses. He allegedly stated, "I'll take care of finding out where the dope is. I'll handle Kumar." This was some days before the offenses occurred.

On the night of the offense Mr. Pinholster apparently planned his robbery and was aware of what he was doing. This is by inference as he did not provide any subjective information other than his directing an individual to burglarize Kumar's home.

3. As for mitigation, *it does not appear Mr. Pinholster's epilepsy, hyperactivity as a child, or incorrigibility were related to the offenses except the incorrigibility reflects upon his psychopathic personality traits.* He was not under the influence of extreme mental or emotional disturbance, nor did he have impaired ability to appreciate the criminality or conform his conduct to the requirements of the law.

...

> Also, because of Mr. Pinholster's personality disorder it is likely *he would be recalcitrant and a security problem while in custody*.

[ER 797-98] (emphases added).

Years later, in 2002, when presented with the additional evidence gathered by habeas counsel, the same Dr. Stalberg found it of marginal significance and did not change his diagnosis:

> As set forth in my declarations of April 19, 1997; January 24, 2000; and June 5, 2001, the additional documents I have reviewed since 1997 did contain some *information* that *might conceivably* be mitigating within the very broad definition of California Penal Code section 190.3(k). On the other hand, as I testified at my deposition in July 2001, the additional materials I reviewed *did not alter my conclusion* that Mr. Pinholster suffers from Antisocial Personality Disorder , as that term is defined in the DSM-III.

[ER 793] (emphases added).

Given Dr. Stalberg's expert opinion, trying to develop a psychiatric mitigation case at the time of trial would have been extraordinarily difficult. He told the lawyers that Pinholster was entirely sane and sober on the night of the murder and that, in general, he's a psychopath. Unlike un-rebutted evidence of brain damage or post-traumatic stress

disorder, *Porter v. McCollum*, 558 U.S. ---, 130 S.Ct. 447, 451-52 & nn.4-5, ---L.Ed.2d ---- (2009) (per curiam), what Dr. Stalberg had to say would hardly have been the stuff of mitigation; most likely it would have been aggravating. *Daniels v. Woodford*, 428 F.3d 1181, 1204-05 (9th Cir.2005); *Gerlaugh v. Stewart*, 129 F.3d 1027, 1034-35 (9th Cir.1997); *see also Graham v. Collins*, 506 U.S. 461, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993) (Thomas, J., concurring). Had Dr. Stalberg testified, *see* pp. 718-19 *infra*, Pinholster would be here arguing that his lawyers were incompetent for putting him before the jury. *See, e.g., People v. Hines*, 15 Cal.4th 997, 1064-65, 64 Cal.Rptr.2d 594, 938 P.2d 388 (1997). Moreover, counsel practicing criminal law in California back then would have been aware of a number of capital cases where psychiatric testimony backfired with devastating effect. *See, e.g., Harris*, 949 F.2d at 1505;*People v. Williams*, 44 Cal.3d 883, 934-35, 245 Cal.Rptr. 336, 751 P.2d 395 (1988); *People v. Robertson*, 33 Cal.3d 21, 44 n. 11, 188 Cal.Rptr. 77, 655 P.2d 279 (1982).[11]

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[11] *Harris* is especially instructive because of the uncanny parallels to *Pinholster*. Harris, like Pinholster, was charged with two murders and a robbery. Harris raised an alibi defense and testified during the guilt phase, admitting to robbery but denying the two murders. (Pinholster, too, admitted robbery.) At the penalty phase, Harris's mother and sister testified that he'd been born prematurely and had suffered abuse from his father because the father believed Harris was someone else's son. They testified that, as a result of this abuse, Harris suffered a head injury when his father knocked him

(continued...)

With no realistic possibility of a psychiatric mitigation defense, what could Pinholster's lawyers do? Unlike habeas counsel, who have years of time, unlimited resources and the power to conjure imaginary mitigation cases with which to mesmerize federal judges, trial counsel are stuck with the hard realities that are the lot of the trial lawyer. One such reality is the client's wishes and preferences. Pinholster did not testify at his own evidentiary hearing in district court, so we don't know first-hand what instructions he might have given his lawyers, but we do have a pretty good idea: The record contains the report of Sheryl Duvall, who was an investigator for Pinholster's first habeas counsel, a document the majority wrongly refuses to consider.[12]

(...continued)
off his high chair, an injury that resulted in "convulsions, blood coming out of his mouth, nose and ears." 949 F.2d at 1506. The jury also heard that "Harris's father[ ] tried to choke Harris with a table cloth ... [and that he] beat Harris and other children 'into unconsciousness several times when they were kids,' and that Harris was abused from the time he was a little baby." *Id.* Harris's father "was eventually sent to prison for child abuse and molestation." *Id.* After hearing all this, the jury sentenced Harris to death and he was long ago executed.

[12] The majority shuts its eyes to this document because it is supposedly hearsay. Maj. op. at 673. But Pinholster's own statements to Duvall aren't hearsay; they're an admission by a party-opponent, which the federal rules specifically exclude from the definition of hearsay. Fed.R.Evid. 801(d)(2). As for Duvall herself, her report was admitted as Exhibit 238 by
(continued...)

Duvall interviewed Pinholster in July 1991, about 7 years after the trial. She reports that Pinholster, at that time, "[wa]sn't enthused about attempting to get a reversal on penalty alone" and "had instructed his trial attorney not to put on a penalty defense." [Ex. 40-1] Of course, it is entirely rational not to want to spend decades as an inmate in a maximum security prison, and quite a few capital defendants have chosen not to try to have death sentences "reduced" to life behind bars. *E.g.*, *Demosthenes v. Baal*, 495 U.S. 731, 732-34, 110 S.Ct.

(...continued)
stipulation. **[ER 1412]** Pinholster reserved no hearsay objection (or any other objection), so it is part of the record and there is no obstacle to considering it. *See United States v. Foster*, 711 F.2d 871, 877 (9th Cir.1983). Pinholster, in fact, never objected on hearsay or any other grounds to the state's use of the Duvall report below; the hearsay argument was raised sua sponte by the district judge, who must have found the Duvall report inconvenient to deal with. **[ER 1449]** Petitioner does not defend the judge's hearsay ruling on appeal. There is something very wrong with the court sua sponte-and selectively-raising an objection that both parties have bypassed. If the Duvall report is hearsay and cannot be considered, why didn't the district court raise similar objections to other out-of-court statements, such as the declarations of Pinholster's siblings and the reports of Drs. Vinogradov and Olson? The parties obviously relied on mutual waiver of hearsay objections in order to streamline the hearing; we have no business upsetting that arrangement just to help out one side.

2223, 109 L.Ed.2d 762 (1990); *Gilmore v. Utah*, 429 U.S. 1012, 1013 n. 1, 97 S.Ct. 436, 50 L.Ed.2d 632 (1976) (Burger, C.J., concurring). Pinholster's lawyers would have been entitled-maybe required-to respect that choice.

Duvall also reported that Pinholster's "most significant relationships appear to have been with his mother, step-father and maternal grandfather." The report continues:

> Scott told me he has always felt very close to his mother for whom he had nothing but praise. "She's always been supportive of all the kids. She's always the first there and the last to leave. She always had a hot dinner on the table." Further, Scott said to his knowledge his mother has never abused drugs or alcohol. She always treated her children kindly, was never abusive.
>
> Scott continues to stay in close contact with his mother. She visits him nearly every month in San Quentin. *Scott told me he was upset by his mother testifying at his trial.* He thought it was unnecessarily hard on her.

[Ex. 40-3] (emphasis added). Pinholster also reported that he had no recollection at all of his natural father, Garland.

And this is what Duvall revealed about Pinholster's step-father:

> Bernice [sic] [Pinholster's mother] has told me Mr. Brashear [Pinholster's stepfather] abused her boys, particularly Scott, as they were growing up. Scott doesn't concur. He said while his stepfather was hard on them, in his opinion he and his brothers benefitted from Mr. Brashear's discipline-"it toughened us up." He had a home made paddle which he used freely on the boys. According to Scott, this worked to their benefit as they lived in tough neighborhoods so they needed to get used to rough treatment.

[Ex. 40-3]

Pinholster also had positive things to say about his grandparents:

> When Scott was small Mr. and Mrs. Baumback [sic] had a chicken farm in Sunland. Scott used to spend his summers there. He and his grandfather were very close. Mr. Baumback [sic] was affectionate with the boys. He made them work hard on the farm but he was quick to praise their efforts. It seems that he made them feel good about themselves.

[Ex. 40-4]

Seen through the looking-glass of a quarter-century of hindsight pigs might fly, but in the here and now, when a lawyer has to make hard decisions

about his client's case, not every theoretical possibility can be turned into a reality. Counsel can try to cajole or persuade, but experienced lawyers know that pushing a client too far can backfire. Pinholster was not enthusiastic about putting on a mitigation case, and he probably did instruct his lawyers not to do so, as he told Duvall. The lawyers may have persuaded him to let them put his mother on the stand, but he was reluctant and resentful. Still, the lawyers must have reminded him that everyone has a mother and the jurors may take pity on her even if they feel no pity for the son. Pinholster went along but, years later, he still didn't like it. That tells us something about the stiff resistance counsel could have expected from Pinholster had they proposed trashing his mother in open court, as the majority does today.

Is it possible, is it even conceivable, that Pinholster, who was not enthusiastic about life in prison, would have allowed his lawyers to put his estranged-and strange-relatives on the stand to tarnish his grandparents? To say that his step-father was a monster, to besmirch his beloved mother as a selfish, uncaring, neglectful crone who wore mink while the children had no food? Even if Pinholster had allowed this-and I can't imagine he would have-what *good* would it have done? It certainly wouldn't have worked for the mother to testify, and then to be followed to the stand by the sister, brother, son and daughter calling her a selfish liar. Such a family food fight would have done Pinholster only harm. Had the lawyers decided to go with the other relatives, and had Pinholster let them do so, they would have had to give up the mother, forfeiting the inherently sympathetic bond they hoped to establish between

her and the jurors. It's not clear to me that this would have been a wise trade-off. *See* pp. 716-17 *infra*.

If we assume, as the majority does, that Pinholster's lawyers were Laurel and Hardy, all such calculations might seem far-fetched. But we are required to presume-strongly presume-that the lawyers were competent, and we must look at the situation through their eyes. We know that the lawyers talked to Pinholster and his mother; they also talked to Pinholster's brother Terry and had a trial run at using him as a mitigation witness-with no success. *See* pp. 697-98 *supra*. Not only did the jury disbelieve Terry's testimony, but the prosecutor managed to insinuate that he was the conduit of the first death threat against Art Corona. [TR 6030] Maybe my colleagues in the majority would put Terry the Enforcer on the stand to help "humanize" Pinholster and soften the jury in his favor, but a competent lawyer might think better of it. The other erstwhile family witnesses had serious disabilities too. Burnice's brother Keith was so estranged over an inheritance dispute that he didn't even know Pinholster was on trial for murder. Pinholster's sister had a serious criminal record.

One need only read the declarations and testimony of the various Pinholster relatives to see that they aren't exactly the Osmonds. A competent lawyer talking to Pinholster, his mother and Terry would have quickly figured out that parading the family members through the courtroom to snipe at each other would do Pinholster no earthly good. *See* pp. 716-17 *infra*. Lawyers are hired to make those judgments and, best I can tell, Pinholster's lawyers

called this one right. At any rate, we certainly can't say that the California Supreme Court was unreasonable for not second-guessing them. That one of Pinholster's lawyers, years after the trial, wouldn't offer tactical reasons for the defense team's choices, maj. op. at 713-14, does not undermine the California Supreme Court's judgment. *See Strickland*, 466 U.S. at 688, 104 S.Ct. 2052;*Murray v. Carrier*, 477 U.S. 478, 484, 487-88, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986); p. 701 n.9 *supra*.

The majority also forgets that there are no free-throws in criminal trials. *See Belmontes*, 130 S.Ct. at 386, 388-89. If the defense has a witness testify about Pinholster's peaceable tendencies, then the state gets to cross-examine that witness about all of Pinholster's misdeeds. If Pinholster puts on evidence about his medical or mental problems, this opens the door to evidence that he's a remorseless psychopath. Pinholster's counsel faced a serious risk that a mitigation case could turn out to be aggravating. *See Belmontes*, at 384.

Burnice Brashear might not have been the ideal mitigation witness; then, again, Mother Theresa probably wasn't available. But a mother-one obviously devoted to her son, and vice versa-has a pretty good chance of arousing the jury's sympathy while not giving the prosecution many openings to inflict damage through cross-examination or rebuttal. Burnice provided many details about Pinholster's head injuries, abuse by his step-father, problems in school, problems with his siblings, his being beaten badly in jail and she confirmed Terry's account of Pinholster's epilepsy. Sure, Burnice could have been more effective in her testimony, but not everyone is

lucky enough to have Joan Crawford for a mother.

My colleagues miss the point entirely when they refer to Burnice's testimony as "misleading," "self-serving," "inaccurate" or "devastating." Maj. op. at 672-73, 675, 677-78, 683. The main point of Burnice's testimony was to create sympathy for herself and the other members of Pinholster's family in the hope that the jury would take pity on *them* and spare them the agony of losing a son and brother to the executioner. That's what's known as the "family sympathy" mitigation defense and other lawyers in California used it at the time. *People v. Cooper,* 53 Cal.3d 771, 801, 844, 281 Cal.Rptr. 90, 809 P.2d 865 (1991); *In re Visciotti,* 14 Cal.4th 325, 336-37, 58 Cal.Rptr.2d 801, 926 P.2d 987 (1996). Is this a perfect strategy? Probably not, but there probably *is* no perfect strategy for mitigating a bloody double-murder by a smug, violent and remorseless psychopath.

Defense counsels' strategy kept Pinholster's jury from coming back with a swift death verdict: The jury deliberated for two days before making its decision. Do my colleagues really think that Pinholster would have done better if his lawyers had put on the child-molesting sister, the extortionist brother, the persnickety aunt and the greedy uncle to tell the jury that Burnice was a terrible mother who deserved to see her son executed? A competent lawyer might think otherwise.

3. Deference to the State Supreme Court. The district court did not defer in the least to the California Supreme Court for the simple reason that it, and the parties, mistakenly believed that AEDPA

deference did not apply. *See Calderon*, 163 F.3d at 540. No sooner had the district court finished its work than the Supreme Court disabused it of this notion in *Garceau*. 538 U.S. at 206-07, 123 S.Ct. 1398. But the district court refused to be disabused: It did not reconsider its ruling in light of AEDPA's clear mandate that we defer to the state courts-and their factual findings in particular-in all but the most unusual circumstances. We therefore owe the district court no deference at all. Rather, we should be suspicious of its findings as arrived at using the wrong standard and stubbornly persisted in despite clear contrary guidance from the Supreme Court. Unlike the Supreme Court in *Porter*, we don't have a reliable finding by a federal or state trial court that counsels' performance was deficient.

Perhaps led astray by the district court's cavalier attitude, the majority doesn't give much deference to the state court either. The opinion recites all the right verbal formulae, although it does twice denigrate the California Supreme Court's action as a "postcard" denial, maj. op. at 660 n.3, 683, suggesting perhaps that the state court didn't look at Pinholster's petition very closely or carefully and therefore isn't entitled to a full measure of deference.

In fact, it's abundantly clear that the California Supreme Court looked at this case closely. By the time it got Pinholster's first habeas petition, the justices were already familiar with his case. Only three years earlier, they had written an exhaustive opinion dealing with a host of issues in Pinholster's trial, including whether the state had given timely notice of a penalty-phase hearing. On receiving Pinholster's voluminous first petition, the justices did

not dismiss it out of hand. Rather, they asked for a response from the state on three specific claims of ineffectiveness, all dealing with counsel's performance at the penalty phase. The state filed a response and petitioner filed a traverse. After this briefing was complete, the justices unanimously denied the petition on the merits, and some of the claims on procedural grounds. Justice Mosk would have denied the petition solely on the merits.

Although the process was more abbreviated for the second petition, the justices issued a reasoned order dismissing all counts on substantive grounds and some on various procedural grounds. This time Justice Mosk was joined by Justice Brown in believing that the petition should be dismissed on substantive grounds only.

In light of this record, we are bound to presume that the denial of Pinholster's state petitions represented the reasoned view of the unanimous California Supreme Court. And we must then ask ourselves whether we can say that their collective judgment about the performance of two members of their bar was truly unreasonable. In doing so, we must keep in mind that the California Supreme Court not only is the ultimate arbiter of the conduct, performance and ethics of lawyers admitted to practice in the state, but that it has far more experience with IAC claims than we do. In the 15 years preceding Pinholster's habeas petitions, the California Supreme Court resolved no fewer than 177 such cases.

Based on their vast experience with criminal trials in general and capital trials in particular, the

California justices had any number of reasons for finding that Brainard and Dettmar weren't incompetent. For example, they may have relied on cases where they'd held that "[a] defendant appearing in propria persona is held to the same standard of knowledge of law and procedure as is an attorney." *People v. Clark*, 50 Cal.3d 583, 625, 268 Cal.Rptr. 399, 789 P.2d 127 (1990). If so, they would have held Pinholster responsible for failing to give his lawyers notice of the state's intent to hold a penalty-phase hearing, along with any resultant failure to adequately prepare for it.

The justices may have also reasonably believed that whatever continuance the superior court would have allowed after Pinholster's counsel were notified of the penalty phase would amount to, at most, a few days or a week; the jury that had just rendered the guilty verdict could not be forced to return many weeks or months later. So the court could have concluded that there just wasn't that much else a competent lawyer could have done in such a short time. Or the justices may have believed that a lawyer is entitled to rely on a competent expert to request information if the materials provided by the lawyer are insufficient. And, as Dr. Stalberg did not ask for further materials in making his diagnosis, the court may have concluded that competent counsel were not required to provide any such additional materials. *E.g.*, *Turner*, 281 F.3d at 876;*Wildman v. Johnson*, 261 F.3d 832, 838 (9th Cir.2001); *Harris*, 949 F.2d at 1525. Or the court may have had in mind the bad experiences of other defense lawyers who put on psychiatric testimony in capital cases around that time, and concluded that a lawyer who got an aggravating psychiatric report would be foolish to

raise a psychiatric mitigation defense. *See, e.g.*, *Thompson v. Calderon*, 86 F.3d 1509, 1525 (9th Cir.1996) (since overruled); *Hines*, 15 Cal.4th at 1064-65, 64 Cal.Rptr.2d 594, 938 P.2d 388;*Williams*, 44 Cal.3d at 934-35, 245 Cal.Rptr. 336, 751 P.2d 395;*Robertson*, 33 Cal.3d at 43 n. 11, 188 Cal.Rptr. 77, 655 P.2d 279.

The California Supreme Court acted much closer in time to the trial and generally has a much better feel for what is reasonably expected of a competent criminal trial lawyer in California. Having twice looked at Pinholster's claims of ineffectiveness, the justices-with not a single dissent among them-concluded that counsel were effective, or that Pinholster was not prejudiced, or both. It takes considerable hubris to say that all of the justices were not merely wrong, but so egregiously wrong that they *unreasonably* applied clearly established Supreme Court precedent. Justice Mosk, were he still with us, would be surprised and, I believe, hurt by such a suggestion.

C. The California Supreme Court did not twice unreasonably apply established Supreme Court precedent in concluding that Pinholster was not prejudiced by any deficiency on the part of his trial counsel

Under the heading "Available Mitigation Evidence," the majority throws in every scrap of even potentially mitigating evidence gathered by Pinholster's habeas counsel during the course of two decades of investigation and expert-shopping. Maj. op. at 675-78. It then concludes that Pinholster was prejudiced because his trial counsel didn't present

this evidence on his behalf. But much of the evidence the majority relies on isn't properly considered, either because it was not presented to the state courts or because it could not possibly have been found by diligent trial counsel back in 1984. Almost all the rest of the evidence *was* disclosed to the jury during the penalty phase.

At best, the majority focuses on some minor differences in emphasis that don't amount to a hill of beans. *See Van Hook*, at 15. At worst, the majority dramatically overreads *Terry Williams*, *Wiggins* and *Rompilla*, cases that are irrelevant to the prejudice inquiry under AEDPA, in a way that will hamstring the states in our circuit for decades to come. The controlling case is *Visciotti*, and it clearly requires us to accept the California Supreme Court's determination that Pinholster wasn't prejudiced.

Below I review the mitigation evidence in the order listed by the majority.

Organic Brain Damage. There are three separate and independent reasons we may not consider the expert reports that purport to diagnose Pinholster with brain-damage-related mental illness caused by childhood head injuries. First, evidence of this supposed relationship was neither presented nor diligently pursued in the state courts. It was not presented in the first state habeas petition, which relied on Dr. Woods as the psychiatric expert, and it was not presented in the second state habeas petition, where Pinholster relied on Dr. Stalberg-who later let him down and testified for the state. Nor, for the reasons I explained earlier, was Pinholster diligent in developing the theories of Drs. Olson and

Vinogradov. Thus, we can't consider them. *See* 28 U.S.C. § 2254(e)(2); pp. 703 *supra*.

Second, petitioner has presented no evidence that a competent lawyer in 1984 could or would have found an expert to advance the theory that organic brain damage caused Pinholster to commit two cold-blooded murders. In fact, the record speaks loudly to the contrary: It wasn't until Pinholster's seventh legal team, 18 years after the trial, worked with a third set of psychiatric experts that they came up with this dubious theory.[13]

Moreover, Pinholster's trial lawyers *had* an expert, and a very good one: Dr. Stalberg. Pinholster

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[13] The diagnosis proffered by Drs. Vinogradov and Olson is vigorously disputed by the state's experts, who cast serious doubt on the notion that any reputable psychiatrist would have reached the same diagnosis at the time of Pinholster's trial. Dr. Vinogradov's theory, in a nutshell, is that Pinholster must be suffering from brain damage caused by his childhood injuries because that is the simplest explanation for his behavior. **[ER 730-41, 1273-1316]** Neither she nor Dr. Olson performed a CT scan, MRI or any other test that actually showed the existence of brain damage, or suggested that such tests would have been available to reveal injuries at the time of trial. The state's experts held firmly to the view that Pinholster's childhood injuries weren't responsible for his antisocial behavior. **[ER 754, 795]** Indeed, Dr. Rudnick maintained that one of the two accidents caused no head trauma at all, injuring only Pinholster's shoulder and ear. **[ER 768]**

thought so highly of him that he re-hired him as the expert for his second state habeas petition. Even when he fired Dr. Stalberg for coming up with the wrong opinion, Pinholster didn't dispute his competence. And what did Dr. Stalberg tell Pinholster's trial lawyers in very clear terms? Their client is sane, wasn't drug or alcohol-impaired at the time of the murder and is a garden-variety psychopath. *See* pp. 702-03 *supra*.

We and the California Supreme Court have clearly held that a competent lawyer may rely on the opinion of a competent expert and need not go expert-shopping until he finds one whose opinion he likes. *Harris*, 949 F.2d at 1525;*In re Fields*, 51 Cal.3d 1063, 1075, 275 Cal.Rptr. 384, 800 P.2d 862 (1990); *People v. Grant*, 45 Cal.3d 829, 863, 248 Cal.Rptr. 444, 755 P.2d 894 (1988); *Williams*, 44 Cal.3d at 945-46, 245 Cal.Rptr. 336, 751 P.2d 395. So, even if experts like Drs. Vinogradov and Olson *could* have been found in 1984, which petitioner has never proven, a competent lawyer would have had no duty to go looking for them. Until today, that was the settled law of our circuit. It should *still* be the law for AEDPA purposes because the United States Supreme Court has not held otherwise.

The majority might be under the mistaken impression that Dr. Stalberg would have come up with the organic-damage theory at trial if only he'd known about the head injuries, the epilepsy and all the other "mitigating" evidence that teams of habeas counsel have dredged up over the last two decades. But Dr. Stalberg *did* know about the head injuries (they are in the probation report the lawyers gave him) and about the epilepsy (he *mentions* it twice in

his 1984 letter to Dettmar) at the time of trial, neither of which he thought was relevant. [ER 798; Ex. 10-2]

And what about the rest of the stuff that is supposedly so essential in assessing Pinholster's sanity? We need not speculate because Dr. Stalberg is here to tell us. He looked at it all and reached exactly the same diagnosis as in 1984: Pinholster is a sane psychopath. [ER 793] It's a pipe dream to imagine that a competent trial lawyer in 1984 who went to his competent expert with all this evidence and got this diagnosis would have nonetheless searched for (much less found) a Dr. Vinogradov to reach the opposite conclusion-all in the week or two the trial judge might have been willing to continue the penalty phase.

There is a third reason the majority shouldn't rely on Dr. Vinogradov's and Dr. Olson's evidence: It says it doesn't need to. Maj. op. at 669. By representing that it would reach the same conclusion without their reports, the majority is holding that what remains is sufficient, standing on its own, to show that the California Supreme Court unreasonably applied *Strickland*. If this is what the majority means to hold, it should have the courage of its convictions and drop its discussion of the psychiatric evidence. It can only cause confusion in the law of the circuit for the majority to say in one part of its opinion that the psychiatric evidence is superfluous but then later rely so heavily on it.

In fact, the majority can't possibly let go of the psychological evidence because, once we remove the diagnosis that Pinholster suffers from trauma-

induced mental illness, there is very little left with which to impugn the judgment of the lawyers, far less the judgment of the California Supreme Court.

Even if it were proper to consider this evidence, the majority gives it far too much weight by relying on law that has no place in a federal court's review of a state court decision under AEDPA. The majority's infatuation with the supposedly magical effect of evidence of organic mental illness, as opposed to merely psychological mental illness, *see* maj. op. at 676-79, is another area where our court has gotten out in front of the Supreme Court. *But see*28 U.S.C. § 2254(d)(1). I therefore need not engage the majority in a protracted debate about the wisdom of *Caro v. Woodford*, 280 F.3d 1247 (9th Cir.2002), and *Douglas v. Woodford*, 316 F.3d 1079 (9th Cir.2003). Nor need I argue that the en banc court should take this opportunity to overrule *Caro* and *Douglas*, although it should because there is no principled distinction between "organic" mental illness and "mental" mental illness. All I need point out is the undebatable: Under AEDPA, we may rely only on law clearly established by the Supreme Court. Circuit precedent, which is all *Caro* and *Douglas* are, isn't enough for granting relief under AEDPA. That the majority is unable to cite a single Supreme Court case in support of this distinction is itself proof that it has no lawful basis for reversing the California Supreme Court.

Epilepsy. The majority spends some time discussing epilepsy, and whether it was caused in childhood by Pinholster's head injuries or (as his mother speculated) as a result of a prison beating. It doesn't matter: Epilepsy is a seizure disorder. If not

controlled by drugs, it causes the afflicted person to drop to the ground with stiff arms and legs, clenched fists and often foaming at the mouth. To those who have seen an individual in the midst of an epileptic fit, it is an unforgettable, scary experience. But when not in the throes of a fit, the individual behaves normally; it is not a mental illness and his faculties are not impaired.

No one has suggested, and it would make no sense to suggest, that Pinholster robbed, beat and stabbed two people to death while having an epileptic fit. Indeed, Dr. Stalberg, who interviewed Pinholster about the events on the night of the murders, remarked how good Pinholster's memory was and concluded that he hadn't been impaired or intoxicated. [ER 798] Dr. Stalberg knew of the epilepsy and mentioned it in his report, but observed it was irrelevant. And Dr. Stalberg tells us today that, even with all the new evidence, he stands by his original diagnosis. Trial counsel had educated themselves as to epilepsy as well, *see* pp. 697-98 *supra*, and must have been convinced it was a dead end. We're in no position to second-guess that judgment.

Abusive and Deprived Childhood. The majority tries to make Pinholster's childhood seem like hell on earth by using alarmist phrases like "abusive and deprived upbringing," maj. op. 677, and "suffered extreme deprivation," maj. op. at 679. The majority also tries hard to create the impression that the evidence presented on habeas was wildly different from what the jury heard, characterizing the mother's testimony as "misleading," maj. op. at 672, 675, 678, and the testimony of the other family

members as standing "[i]n stark contrast," maj. op. at 678, and being vastly different from hers. Maj. op. at 680. In fact, what's remarkable is how *little* support the family members provide for Pinholster's theory of extreme abuse and deprivation.

Pinholster's mother testified at trial that the punishment inflicted by her husband, Scott's stepfather, was "abusive or near abusive." Maj. op. at 677. In what the majority claims is "stark contrast," Pinholster's siblings testified that the step-father "frequently beat Scott while Scott was a child.... Bud [the stepfather] would use his fists, a belt, or anything else available, including on at least one occasion a two by four board." Maj. op. at 678 (Terry Pinholster). And, "Scott as a child was frequently physically abused by Scott's step-father, Bud Brashear. Bud hit Scott with his fists as often as several times within one week. Bud's punishments were unpredictable and severe." Maj. op. at 678 (Tammy Pinholster). While Pinholster's siblings give somewhat more detail than the mother, what they have to say is no different from-much less "in stark contrast" to-the mother's description. What they describe *is* abuse or near-abuse; their testimony confirms, rather than contradicts, the mother's testimony.

Then there is the suggestion that Pinholster's grandmother abused him because he looked like his father, whom Pinholster's grandparents despised. What's remarkable here is just how weak this testimony actually is. Both Pinholster's aunt and uncle make it clear that they are talking about nothing more than severe spankings. The aunt, Lois Fosberg, is quite explicit about this:

Q: "And at times, your mother would spank him?"

A: "Yeah."

Q: "How many times did you see your mother spank Scott?"

A: "Quite a few."

Q: "Can you give me an estimate?"

A: "No.... She was very rough with him and not so with the other ones."

Q: "And how did she spank him? Did she punch him or hit him with her palm, backhand him, or what?"

A: "Hit him with her hand or jerk his arm or--"

Q: "With her palm?"

A: "Yeah, things like that."

[2 DT 53-54]

The uncle also leaves no doubt that what the grandmother supposedly did to Pinholster was no more than spanking:

A: "[I]t occurred-often she would pick him up out of the playpen by one or two arms and just spank him across the

> back and butt and the legs. And I mean, more than once. I don't know how many times. It was enough to make an impression on me."

[2 DT 125] Pinholster himself says he enjoyed his summers at the grandparents' chicken farm; the grandfather "made [the children] feel good about themselves." [Ex. 40-4]

That's it-that's all the evidence of "abuse" that Pinholster's lawyers have been able to come up with after nearly two decades of digging and investigating.[14] Is what the record *does* support really a "stark contrast" with what Pinholster's mother had to say? To me, it seems like more of the same.

Pinholster himself describes the situation in terms much closer to those of his mother. *See* p. 705

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[14] The majority also says that Pinholster's stepfather used a paddle on him, occasionally knocking him out. Maj. op. at 678. This is not based on evidence in the record. It's a "fact" related by a psychiatrist's report that is based entirely on what Pinholster told him. **[ER 767]** While the psychiatrist can use the information he gathers as a basis for forming his opinion (which can then be undermined, to the extent the facts on which he relies are unsupported), his report can't be used to sneak into the record evidence that was not presented by the usual means, i.e., through sworn testimony subject to cross-examination. The majority is thus wrong to rely on this "evidence."

supra (Duvall interview). Accusing Burnice of misleading the jury by providing an inaccurate picture of Pinholster's home situation is wholly unjustified. Had Pinholster's trial counsel decided to go that route, they might have been able to coax a bit more mileage out of some relatives, but would it really have given them something to suggest an "abuse excuse" for brutally murdering two strangers decades later? I don't think so.

Let's turn now to the majority's claim that Pinholster suffered "extreme deprivation." Maj. op. at 679. The entire support for this version of events, which the majority for some reason believes to be "the truth," comes from the testimony of Pinholster's aunt and uncle, and mostly the aunt. Aunt and uncle were visitors to the household, but their declarations disclose that their observations were infrequent. The aunt makes a general statement that the children didn't get enough to eat, and supports it with a single instance where she saw them mixing flour and water. In the same breath, however, she says that the children were fed "canned food like spaghetti" and the kids would "start throwing food at each other during meals"-awfully strange behavior for starving children. [ER 687] In general, the aunt's testimony borders on the picayune, as she criticizes her sister for not disciplining the children sufficiently, for keeping a dirty house and for living in bad neighborhoods. One next expects her to accuse Burnice of forgetting to weed the lawn. The uncle testifies only that his sister (Pinholster's mother) took good care of herself while the children looked like ragamuffins; he says nothing about food. [ER 682] If this is "extreme deprivation" then there are few defendants in the criminal justice system who

are not extremely deprived and deserving of a pass.

Neither of Pinholster's siblings, who spent far more time in the house than his aunt and uncle, say that they didn't get enough to eat or that they suffered economic deprivation. Indeed, Pinholster himself says exactly the opposite, praising his mother for always having a hot meal on the table. *See* p. 705 *supra* (Duvall interview).

The simple fact is, there's nothing supporting the theory of abuse or deprivation, in stark contrast to the evidence in many other cases. There was no evidence of broken bones, concussions, bleeding, hospitalization or any kind of serious or lasting injury resulting from Pinholster's so-called abuse. *E.g., Wiggins,* 539 U.S. at 517, 123 S.Ct. 2527;*Terry Williams,* 529 U.S. at 370, 120 S.Ct. 1495;*Harris,* 949 F.2d at 1505-06. Pinholster's father didn't try to shoot him. *Porter,* 130 S.Ct. at 449. None of the children were gang-raped. *Wiggins,* 539 U.S. at 517, 123 S.Ct. 2527. In fact, there was no evidence of incest or any kind of sexual abuse. *E.g., id.*; *Hendricks,* 70 F.3d at 1037. Nor was there evidence that the children had to be removed from the home and placed in foster care because they were abused or neglected. *E.g., id.*; *Terry Williams,* 529 U.S. at 395, 120 S.Ct. 1495. There was no evidence that either parent was convicted of child abuse or neglect, or was even charged with such behavior. Terry Williams, 529 U.S. at 395, 120 S.Ct. 1495;*Harris,* 949 F.2d at 1506. Home wasn't a "combat zone." *Van Hook,* at 18. There was no evidence that the children were exposed to promiscuous sex by the parents, were encouraged or forced to commit crimes to sustain themselves or were denied the basic necessities of

life. *E.g., id.*; *Wiggins,* 539 U.S. at 517, 123 S.Ct. 2527;*Moore v. Johnson,* 194 F.3d 586, 613 (5th Cir.1999). The children weren't locked "in a small wire mesh dog pen that was filthy and excrement filled." *Rompilla,* 545 U.S. at 392, 125 S.Ct. 2456. Pinholster didn't grow up in a one-bedroom house described as a "chicken coop." *Belmontes,* at 387. The children didn't live in a home where "someone had had a bowel movement" several places on the floor and "[u]rine was standing in several places in the bedrooms." *Terry Williams,* 529 U.S. at 395 n. 19, 120 S.Ct. 1495. The parents didn't violently assault each other in front of the children. *In re Visciotti,* 14 Cal.4th at 336, 58 Cal.Rptr.2d 801, 926 P.2d 987. Pinholster's father didn't beat his mother so severely that she was hospitalized and lost a baby. *Porter,* at 450. There's no evidence the children had to be hospitalized for drinking when they were very young. *Terry Williams,* 529 U.S. at 395 n. 19, 120 S.Ct. 1495.

It is true that the family was poor; the stepfather was abusive; the mother was more permissive than some would condone; and some of the familial bonds were not particularly warm or caring. But there is absolutely nothing in this record that suggests Pinholster's experience growing up differed from that of millions of other young men from broken homes with parents who have a hard time making ends meet. Hyperbolic language cannot force from the record something it doesn't contain. And what it doesn't contain is anything that could conceivably have swayed a jury to go easy on Pinholster because of his childhood.

We must remember that this jury had just convicted Pinholster of two brutal murders and heard

convincing evidence that this was just the last in a long pattern of brutal crimes. He had previously broken his wife's jaw, seriously wounded someone with a straight-razor, kidnapped someone else at knife-point and on multiple occasions kicked, spit and thrown bodily fluids on police officers. He proudly admitted to having committed hundreds of robberies at gunpoint. The jurors also heard that Pinholster *twice* threatened the life of key prosecution witness Art Corona, most recently just a few days earlier. When Sgt. Barrett saw Pinholster after he returned from court, Pinholster boasted that he'd snowed the jury on the murder charge and "when he got out he'd have to kill [Art Corona]." [TR 7384-85]*Van Hook* reminds us that we must focus on the weight of the aggravating factors, not merely on their number. 130 S.Ct. at 20. Would these jurors, who had just convicted Pinholster of a double murder, take a chance that this uncontrollably violent defendant would make good his threat to arrange for the murder of Art Corona? Not bloody likely.

Family Criminal and Mental History. As the majority recognizes, Pinholster's mother did disclose that her other children had difficulties with the law, difficulties with drugs and alcohol and that Tammy had engaged in self-destructive behavior. Beyond that, the record on habeas does go into more depth regarding the mental, substance-abuse and criminal problems of the Pinholster siblings and of his biological father.

Whether, and to what degree, this is mitigating is highly debatable. Perhaps a mental health expert might have argued from this evidence

that Pinholster suffered from some genetic mental defect, but none here have. As noted, Dr. Stalberg always believed Pinholster was fundamentally a sane psychopath. The same is true of Drs. Rudnick and Geiger. Drs. Olson and Vinogradov, whose evidence we may not consider, *see* pp. 688-91 *supra*, believed that Pinholster's "organic personality syndrome" was induced by childhood head trauma which, of course, cannot possibly be inherited and thus bears no relationship to whatever mental problems his siblings had. He never knew his biological father, so any bad behavior on the father's part wouldn't have affected the son. *See* p. 705 *supra* (Duvall interview). And, of course, providing evidence that Pinholster's brother and sister are nuts would have undermined their usefulness as abuse and neglect witnesses.

Without a psychiatric expert to relate the mental and substance abuse problems of Pinholster's siblings to his behavior, this evidence could have just as easily been aggravating as mitigating—more likely the former. As experienced trial lawyers know, jurors are not always in a forgiving or generous mood, especially after they have just convicted a defendant of multiple first degree murders. Having learned that all of his siblings and his biological father suffered from mental problems, they might well have concluded that Pinholster was a bad apple from a bad tree and there was no hope for rehabilitation or redemption. It's not as if such ideas are unheard of, even in the pages of the United States Reports. *See, e.g., Buck v. Bell*, 274 U.S. 200, 207, 47 S.Ct. 584, 71 L.Ed. 1000 (1927).

Pinholster's Substance Abuse. Much of Pinholster's history of substance abuse was newly

presented on habeas, although the jury did hear some of it through his brother Terry's testimony during the guilt phase. We've held before that "juries are unlikely to favor defenses based on abuse of dangerous drugs in evaluating a defendant's culpability for violent behavior." *Mayfield v. Woodford*, 270 F.3d 915, 931 n. 17 (9th Cir.2001). Telling the jury a lot more about what a druggie Pinholster was would probably have hurt him rather than helped him.

There is no evidence, much less clear and convincing evidence, that Pinholster's substance abuse had anything to do with his actions on the night of the murders. At the end of the trial, after the jury returned its death verdict, the trial court made certain findings, including the following: "[T]he defendant's capacity to appreciate the criminality of his conduct and his capacity to conform his conduct to the requirements of law were in no way impaired as a result of mental disease, defect, or the effect of any intoxicants or drugs or a combination thereof." [CT 1185] Under AEDPA, this finding is entitled to a presumption of correctness and can only be overturned if Pinholster rebuts it by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

* * *

So here is where we stand with the mitigation evidence:

Evidence Heard by the Jury

> Pinholster's stepfather was abusive, or nearly so.

Pinholster was in boys homes and juvenile halls after age 10 or 11.

Pinholster's mother ran over him with a car at age 2 or 3, badly injuring his head and requiring treatment at a hospital.

At age 4 or 5, Pinholster was in a car accident where he flew through the window and hit his head badly.

Pinholster started failing at school in the first grade, and has learning problems dating back to kindergarten.

In third grade, Pinholster's teacher suggested that he was "something more than just a disruptive child."

In third or fourth grade, Pinholster was sent to a class for emotionally handicapped children where his performance improved.

Pinholster had a difficult childhood, often getting into fights with his brothers.

A psychiatrist recommended Pinholster be hospitalized at age 10.

At age 12, Pinholster was institutionalized for six months in a psychiatric hospital.

Throughout childhood Pinholster stole

things and had a blustery personality.

At age 18, Pinholster was badly beaten in jail.

Pinholster's personality changed after he was imprisoned in his late teens; he became withdrawn and had difficulty adjusting to life on the outside.

Pinholster has epilepsy, for which he's taken medication, and has had several serious seizures.

The Pinholster siblings had trouble with drugs and alcohol, and his sister was a self-destructive wild girl.

Pinholster's brother Alvin died and was in considerable trouble with the law.

Pinholster's family "sticks close together like you would not believe."

Pinholster was intoxicated on the night of the murders.

New Evidence on Habeas That Was Not Presented to the State Courts

The diagnosis of organic brain damage promoted by Drs. Vinogradov and Olson.

Testimony from Pinholster's uncle about his childhood and Pinholster's mother and grandparents.

New Evidence on Habeas That Was Presented to the State Courts

> Pinholster's aunt thought that his mother was selfish and neglectful, a poor housekeeper, a poor disciplinarian and deprived the children of proper nutrition.
>
> Pinholster's grandmother spanked him, possibly for looking like his biological father.
>
> Alvin's death was by suicide.
>
> Pinholster's biological father may have been mentally ill.
>
> A teacher found Pinholster's mother unreceptive to guidance about how she should handle his learning disabilities and emotional problems.
>
> Only the evidence in the third category was not presented to the jury but could have been.

There just ain't much there. I suppose counsel *could* have presented this evidence, but one thing is clear: It would not have been possible to present the mother's testimony, which painted a relatively rosy picture of the family, and particularly her role in it, and also the testimony of the brother, sister, aunt and uncle, which painted their family life as terrible and the mother as neglectful and selfish. Assuming

that counsel had all this evidence available to present at the penalty phase, they would have had to make a choice: They could go with the mother and try to develop sympathy for her and the family, or they could paint Pinholster's parents as villains and try to work up sympathy for him personally. They absolutely could not do both without having the sides collapse on the middle; the two approaches are not "consistent ... theor[ies] of mitigation." *Porter*, at 455.

Now let's consider the situation counsel found themselves in. The jury had just convicted their client-a white supremacist gang member who boasted of having little regard for others and of committing hundreds of armed robberies of two bloody murders. He had lied to the jury on the stand and generally behaved badly. His testimony would have given the jury a pretty good impression of who they were dealing with. They had also heard, and were about to hear more, about Pinholster's long history of violent and abusive behavior towards just about everyone. The jurors had also heard that Pinholster had threatened prosecution witness Art Corona in an effort to keep him from testifying. Pinholster's own competent psychiatrist was telling his lawyers that their client was sane and sober at the time of the crime and committed the crime because he's a violent psychopath. For reasons I explained earlier, it's not irrational or incompetent for lawyers in that situation to conclude that it would be best to have the mother paint a rosy picture of Pinholster's family life and herself as a mother, in hopes that the jury would take pity on her and spare her son's life to avoid causing her and the rest of the family additional pain.

My colleagues disagree. They believe that there is only one strategy here, namely trying to "humanize" the defendant by trashing the mother and stepfather. I think they're wrong. But let's apply the *Belmontes* methodology anyhow, 130 S.Ct. at 385, 387, turn the clock back to 1984 and try to figure out how far Pinholster's lawyers could have gotten with trying to humanize him.

Imagine this: Counsel leave off the mother and lose whatever sympathy she may have gained for Pinholster. They put on the persnickety aunt who criticizes her sister for neglecting the kids, for failing to discipline them, for looking after herself while the kids were wearing rags and not giving them enough to eat. She also says that the grandmother spanked Pinholster very hard because he looked like his father. They put on Terry-the brother who may have delivered the threat to Art Corona-to say that the stepfather was violent and Pinholster caught the worst of it, and they put on the sister to say the same. Then they put on evidence that their own mitigation witnesses (the brother and sister) suffer from mental illness and are drug addicts and child molesters. And they put on the teacher to say that Pinholster was bright and she recommended mental treatment, but the evil mother didn't listen to her.

Beyond this it gets difficult. They have no commanding officer to testify to Pinholster's decorations and valor during "two of the most critical-and horrific-battles of the Korean War." *Porter*, at 454. Pinholster's personal troubles didn't result from trauma he suffered while shedding blood for his county. *Id.* at 454. There is no evidence that Pinholster "struggle[d] to regain normalcy," *id.* at

454, or that he ever did anything at all to turn away from a life of crime, violence and abuse of everyone he came in contact with. Pinholster's is not "a crime of passion" or one motivated by "emotionally charged, desperate, frustrated" desire. *Id.* at 449. Pinholster did not commit these murders in a drunken stupor. *Id.* at 449. Rather, Pinholster's murders grew out of a long planned burglary, driven entirely by economic motives, and he robbed his victims before stabbing them to death. He doesn't own up to the crimes by pleading guilty, *id.* at 449, but brazenly lies to the jury, claiming that this just isn't his type of crime because he likes guns. Counsel can't point to anything Pinholster has done in his life that was useful, constructive, generous or courageous-nothing at all that might redeem him in the eyes of a rational juror.

Nor do counsel have a psychiatric expert who can testify that Pinholster suffers from mental illness and there's no evidence that such a mental health expert even existed in 1984. So they have to go forward without an expert, in which case they have very little. Or they can go forward with the expert they do have-Dr. Stalberg.

So let's say they put on Dr. Stalberg to tell the jury that there is a bunch of mitigating evidence from Pinholster's past. So far, so good. But the prosecution then gets to cross-examine Stalberg, and it goes something like this:

> Prosecutor: Dr. Stalberg, based on your examination of the defendant, did you form an opinion as to whether he suffers from a mental illness?

Dr. Stalberg: Yes I did.

Prosecutor: Did you diagnose him as being bipolar?

Dr. Stalberg: No, I did not.

Prosecutor: Is he paranoid?

Dr. Stalberg: No.

Prosecutor: Is he a schizophrenic?

Dr. Stalberg: No, he's not.

Prosecutor: Does he suffer from any other recognized form of psychosis?

Dr. Stalberg: No, he does not.

Prosecutor: Would you say that he is completely sane?

Dr. Stalberg: As sane as you and me.

Prosecutor: And do you believe he was sane on the night of the murders?

Dr. Stalberg: Yes I do.

Prosecutor. Did you form an opinion about whether he was impaired by drugs or alcohol on the night of the murder?

Dr. Stalberg: Yes I did.

Prosecutor: Was he?

Dr. Stalberg: It is my professional opinion that he was not.

Prosecutor: Dr. Stalberg, you testified that Mr. Pinholster suffers from epilepsy?

Dr. Stalberg: I believe he may have suffered from epilepsy sometime in the past. There have not been any recent manifestations.

Prosecutor: Do you believe he suffered an epileptic fit on the night of the murders?

Dr. Stalberg: I have no reason to believe this.

Prosecutor: Would suffering from epilepsy impair his mental faculties, the same as schizophrenia or paranoia might?

Dr. Stalberg: No it would not.

Prosecutor: Can epileptic fits be faked?

Dr. Stalberg: Very easily.

Prosecutor: Is it possible to tell a real epileptic fit from a fake one?

Dr. Stalberg: Perhaps a doctor could,

but I doubt most lay people would be able to tell the difference.

Prosecutor: Did you form any other professional opinion as to Mr. Pinholster's mental condition?

Dr. Stalberg: Yes I did.

Prosecutor: And can you tell us what that is?

Dr. Stalberg: He has antisocial personality disorder.

Prosecutor: Is that what's known, in common speech, as being a psychopath?

Dr. Stalberg: Yes it is.

Prosecutor: And what does this mean?

Dr. Stalberg: It means he feels no empathy for the suffering of others. He has no conscience.

Prosecutor: Thank you very much. You may step down.

Counsel, of course, would have known that if they opened the door to psychiatric evidence, the state would be entitled to put in such evidence as well. So, if Pinholster put on Dr. Stalberg, the state would have presented its own expert, someone like Dr. Gerger, who examined petitioner on June 19, 1984, and gave his diagnosis as follows:

> The subject was not impaired by mental disease or defect in such a way that he could not appreciate the criminality of his conduct or conform his conduct to the requirements of the law. *This man's conduct showed a high degree of cruelty, callousness and viciousness.* ... DIAGNOSIS: Antisocial personality disorder.... CONCLUSION: This diagnosis is related to the commitment offenses in the sense that this man showed no responsible regard for the reasonable rights of other people and throughout the many years prior to this most recent conviction this character trait was apparent. [Ex. 41] (emphasis added)

Given this reality, competent counsel, as in *Belmontes*,[15] would have been careful to avoid any possibility that the state would put in such damaging psychiatric evidence, and so would have been forced to make do without Dr. Stalberg. That would have left counsel with only the brother, the sister, the aunt, the uncle-all sniping at each other while trashing Pinholster's mother, grandparents and step-father-and the school teacher.

This assumes, for the sake of argument, that

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[15] The opinion's paean to counsel's performance in *Belmontes*, maj. op. at 683, must come as a surprise to certain members of the majority who are particularly familiar with that case. Then again, such recharacterizations of a matter in a habeas case are not so uncommon. *Belmontes*, at 387.

Pinholster would have allowed a mitigation defense which publicly disgraced his mother and stepfather. Is this likely to have led even a single juror to change his mind about the penalty? I seriously doubt it. Far more likely, the jury would have seen this as just one more effort by Pinholster to manipulate them, like his lying and *self-aggrandizing* on the stand.

The Superior Court here made findings about the weight of the aggravating evidence: "The Court finds that the evidence concerning the truth of the Special Circumstances is *overwhelming*, and the jury's assessment of the evidence that the aggravation outweighs the mitigation as to the selection of the proper penalty to be 'death,' is supported *overwhelmingly* by the weight of the evidence." (emphases added). [CT 1184] "Considering all of the evidence, the Court finds that the factors in aggravation *beyond all reasonable doubt* outweigh those in mitigation." (emphasis added) [CT 1186] These are the findings by the judge who saw the entire trial and the jury that convicted Pinholster, neither was set aside on appeal or otherwise. Under AEDPA these findings are entitled to a near irrebuttable presumption of correctness. In light of such overwhelming evidence, it would be impossible to conclude that even one juror would have been swayed by this paltry showing.

My colleagues disagree, but that's not the test. What we should ask is whether the justices of the California Supreme Court unreasonably applied clearly established Supreme Court precedent in concluding otherwise. My colleagues hold that they did by comparing the mitigating evidence here with that in *Terry Williams*, *Wiggins* and *Rompilla*, but

those cases are not on point because not a single one of them required the Court to hold that a state court's determination on prejudice was unreasonable. Rather, in each case, the Court reviewed a state court decision that either applied a standard contrary to Supreme Court precedent or failed to address prejudice at all. *Rompilla*, 545 U.S. at 390, 125 S.Ct. 2456; *Wiggins*, 539 U.S. at 534, 123 S.Ct. 2527; *Terry Williams*, 529 U.S. at 395-96, 120 S.Ct. 1495. Comparison with the facts of those cases is irrelevant because the Court there wasn't required to apply AEDPA deference. The same is true of *Belmontes* and *Van Hook*, both of which resulted in summary reversals even under pre-AEDPA law.

The case on point is *Visciotti*, which did involve a state court determination regarding prejudice, to which the Supreme Court unanimously deferred. 537 U.S. at 22-27, 123 S.Ct. 357. The majority mishandles *Visciotti* as well. It doesn't matter whether we think the prejudice here is probably greater than in *Visciotti*; the Court did not say that *Visciotti* was a particularly close case, nor were there differing views about how *Visciotti* should come out, so nothing can be learned from that comparison. Indeed, *Visciotti* was a summary reversal, which tells us the Court didn't even think the case was close enough to merit argument. *Visciotti* thus hardly marks the outer boundary of what deference the Supreme Court believes we owe state courts in deciding whether a criminal defendant was prejudiced by ineffective assistance of counsel.

Visciotti is actually remarkably similar to our case. The same California Supreme Court decided Pinholster's second habeas petition as Visciotti's

state habeas petition; they were decided by the state supreme court about 10 months apart. In *Visciotti*, as in our case, the defense lawyer chose to rely on the family sympathy defense rather than "humanizing" the defendant because "[i]t was his opinion that any attempt to gain sympathy for petitioner would have failed." *In re Visciotti*, 14 Cal.4th at 334, 58 Cal.Rptr.2d 801, 926 P.2d 987. Counsel therefore did not pursue-and was not aware of-a large "trove" of facts like the majority believes is the case here.

At the federal habeas hearing, Visciotti presented evidence of the

> discordant atmosphere in the Visciotti family home created by an unending series of physical and verbal confrontations between petitioner's parents; physical punishment of petitioner and his siblings; threats of violence; impermanence caused by the family's numerous moves and its impact on school attendance and the ability to make lasting friendships; the children's efforts to escape the household turmoil by hiding, leaving the house, early marriage, and resort to drugs as "self-medication." Social workers, psychologists, and other witnesses testified regarding the impact of these events on petitioner's development and ability to function in society.

Id. at 336, 58 Cal.Rptr.2d 801, 926 P.2d 987. Visciotti's lawyer explained his strategy as follows:

> He decided prior to jury selection in the Visciotti trial, when he saw petitioner's videotaped reenactment of the murder, that he would attempt to elicit sympathy for petitioner's family as his penalty phase strategy. He believed that, although sympathy for petitioner could not be expected, sympathy for petitioner's parents might be. His defense would therefore suggest that the parents were nice people whose son should not be killed.

Id.

While the California Supreme Court justices were thrice unanimous as to Pinholster-once on direct appeal, twice on habeas-they were twice divided in Visciotti's. Notably, Justice Mosk, who wrote the opinion in Pinholster's direct appeal, dissented on the IAC issue in Visciotti's direct appeal and was in deep dissent on Visciotti's habeas petition; he even invited the federal courts to set aside the death sentence. *Id.* at 359-62 & n. 1, 58 Cal.Rptr,2d 801, 926 P.2d 987. Justice Brown also dissented, and explained-in terms not so different from those employed by the majority today-the many ways in which Visciotti's lawyer failed him, and how this must have prejudiced him:

> The penalty phase proceedings against petitioner, the subject of this court's order to show cause, are a textbook example of a process gone awry. Simply put, Agajanian [Visciotti's lawyer] failed petitioner at *every* stage of the

proceedings. I offer several of many, many examples that could be given.

During his pretrial preparation, Agajanian "did not send for the police report [of the Cusack incident] or go through the prosecutor's file to read it in advance of trial and thus was surprised and unprepared to face that [aggravating] evidence." Likewise, he "failed to investigate and discover mitigating evidence as a result of his ignorance of the types of evidence a jury might consider mitigating."

During the penalty phase of the trial itself, Agajanian "failed to present readily available evidence that would have revealed to the jury the extent to which petitioner was subjected to psychological and physical abuse as a child, the impact the dysfunctional and peripatetic family life had on petitioner's development, and the correlation between these events and petitioner's resort to drugs." Also during the penalty phase of the trial, Agajanian "delivered an unfocused closing argument, during which he undercut his client's own case by telling the jury that the evidence of petitioner's mental and emotional problems was not mitigating."

....

In the context of the penalty

phase of the trial, it is clear that Agajanian "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." This court had it all wrong when, on direct appeal, it characterized Agajanian's penalty phase closing argument as "a rambling discourse, not tied to particular evidence." In fact, during the course of the so-called "rambling discourse," Agajanian systematically conceded nine of the eleven aggravating and mitigating factors set forth in Penal Code section 190.3 to the prosecution.

Agajanian conceded "[t]he facts and circumstances of the case in my opinion do not have to be reviewed. There is no way to make light of those types of things just like there's no way to make light of any kind of murder, whether or not there's a robbery involved...." He conceded "past violence" was a factor in aggravation. He conceded "[w]ith respect to the prior conviction for assault with a deadly weapon, there's no way to make light of that either." He conceded "[w]ith respect to emotional disturbance, there's no evidence of that. That isn't even a factor to be considered." He conceded "[w]ith respect to the next one ... victim participated or consented. That's not applicable. There's no evidence of that." He conceded "same situation" with respect to justification. He conceded

"[e]xtreme duress, there was no evidence of that either. Although defense lawyers would like to have that present, it's not fair." He conceded "with respect to diminished capacity, when you ladies and gentlemen returned this verdict of first degree murder and found special circumstances, you indicated to all of us that you did not find diminished capacity. So if you did not find diminished capacity, how can I argue that as a factor of aggravation or mitigation? It just does not apply. It's not there." And he conceded "the indication here was that [petitioner] was not an accomplice or that his participation was minor-exactly the opposite. [Petitioner] is, as the People said, the trigger man."

Certainly, as the majority states, "[t]he aggravating factors were overwhelming" and the mitigating factors were "minimal in comparison." Even in such a case, though, counsel must hold the prosecution to its heavy burden. Agajanian did not rise to the occasion. Although his abortive attempts to construct a family sympathy defense exposed some of the mitigating evidence to the jury, Agajanian undermined its effectiveness by "conceding that the jury could find that all of the possibly aggravating factors were present, and none of the mitigating." Indeed, the referee

> specifically found, and the majority agrees, that Agajanian "had no intention of introducing any evidence in an attempt to draw sympathy to his client."

Id. at 364-66, 58 Cal.Rptr.2d 801, 926 P.2d 987 (internal citations and footnote omitted). According to Justice Brown, Agajanian did far more damage to Visciotti's case than Brainard and Dettmar did to Pinholster's.

No doubt swayed by the strong dissents of these well-respected state justices, the district court granted habeas and we affirmed. The United States Supreme Court was not impressed:

> The [Ninth Circuit] Court of Appeals disagreed with [the majority of the California Supreme Court,] suggesting that the fact that the jury deliberated for a full day and requested additional guidance on the meaning of "moral justification" and "extreme duress" meant that the "aggravating factors were not overwhelming." Perhaps so. However, under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. The federal habeas scheme leaves primary responsibility with the state courts for these judgments, and authorizes federal-court intervention only when a state-court decision is objectively

> unreasonable. It is not that here. Whether or not we would reach the same conclusion as the California Supreme Court, we think at the very least that the state court's contrary assessment was not unreasonable. Habeas relief is therefore not permissible under § 2254(d).

Visciotti, 537 U.S. at 26-27, 123 S.Ct. 357 (internal citations and quotation marks omitted).

In our case, unlike *Visciotti,* the *same* state supreme court justices were unanimous in denying the habeas petition. As *Visciotti* shows, this was not a court whose members played "follow the leader." Justices Mosk and Brown clearly had minds of their own; Justice Kennard wrote separately to explain why she agreed with the majority. *In re Visciotti,* 14 Cal.4th at 357-59, 58 Cal.Rptr.2d 801, 926 P.2d 987. But in Pinholster's case they were unanimous, with the firebrand dissenter, Justice Mosk-who had spent decades on the California Supreme Court championing the rights of criminal defendants-fully on board. Indeed, Justices Mosk and Brown *did* show a difference of opinion in Pinholster's case; they both would have denied the petition entirely on the merits and not on procedural grounds as well. [Exs. B, C-7] One can't say this was a case where the justices brushed aside the habeas petitions without giving them their full attention.

Putting Pinholster's case next to Visciotti's, how can we possibly say that the California Supreme Court unreasonably applied established Supreme Court precedent in the former, when a unanimous

Supreme Court summarily reversed us for saying that in the latter? The cases are remarkably similar, down to the fact that the trial lawyer in both cases was disbarred after the trial. Pinholster's lawyers were no worse than Visciotti's and probably better; at least they didn't concede nine of the eleven aggravating and mitigating factors set forth in the death penalty statute. Can we truly say that we are giving Pinholster's state habeas determination on prejudice the same degree of deference that the unanimous Supreme Court gave to Visciotti's case? I think not.

Conclusion

The trial in this case took place over a quarter century ago. Pinholster's lawyers are both dead. Justice Mosk, who wrote the California Supreme Court's unanimous opinion in Pinholster's direct appeal and participated in both of his habeas petitions, is also dead. Pinholster's two victims are long dead and forgotten; whatever hopes and aspirations they may have had were cut short because they had the misfortune of getting in the way of Pinholster's greed and anger.

Meanwhile, prison has been good to Pinholster. He sits in his cell reading Machiavelli, Voltaire "and all the philosophers" [ER 704], drawing pictures to sell over the internet. He enjoys the gravitas, authority and mentoring opportunities that come with being an elder in his prison gang, and has surgery performed on his knees at taxpayer expense. He still stabs people whenever he can, without passion or regret; "it was just business," he explains. [ER 704] His conscience doesn't trouble him about

the fact that he took the lives of two fellow human beings; he has never expressed the least remorse for his killings. The people of California are entitled to put an end to Pinholster's paid vacation and insist that the punishment lawfully imposed on him be carried out.

I have no doubt that my colleagues sincerely believe they are following the Supreme Court's directions. Admittedly, the Court has been less than clear in this area. *See, e.g., Rompilla*, 545 U.S. at 377, 125 S.Ct. 2456 (majority), 395, 125 S.Ct. 2456 (Kennedy, J., dissenting); *Wiggins*, 539 U.S. at 514, 123 S.Ct. 2527 (majority), 538, 123 S.Ct. 2527 (Scalia, J., dissenting); *Terry Williams*, 529 U.S. at 367, 120 S.Ct. 1495 (majority), 416-17, 120 S.Ct. 1495 (Rehnquist, J., dissenting). But I believe it's been clear enough, and Pinholster's death sentence must be reinstated. If we do not do it ourselves, it will surely be done for us.

APPENDIX B

United States Court of Appeals,
Ninth Circuit

Scott Lynn PINHOLSTER, Petitioner-Appellee,
v.
Robert L. AYERS,* Warden, of the California State Prison at San Quentin, Respondent-Appellant.

Scott Lynn Pinholster, Petitioner-Appellant,
v.
Robert L. Ayers, Warden, of the California State Prison at San Quentin, Respondent-Appellee.

Nos. 03-99003, 03-99008.

Argued and Submitted April 11, 2007.
Filed May 2, 2008.

Kristofer Jorstad, Deputy Attorney General, Los Angeles, CA, for the respondent-appellant, cross-appellee.

Sean K. Kennedy, Federal Public Defender, Los Angeles, CA, for the petitioner-cross appellant/appellee.

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* Pursuant to Fed. R.App. P. 43(c)(2), Robert L. Ayers, the current custodian, is substituted for Jeanne S. Woodford as Warden of the California State Prison at San Quentin.

Appeal from the United States District Court for the Central District of California;

Gary L. Taylor, District Judge, Presiding. D.C. No. CV-95-06240-GLT.

Before: ALEX KOZINSKI, Chief Judge, RAYMOND C. FISHER and
RICHARD C. TALLMAN, Circuit Judges.

Opinion by Judge TALLMAN;
Concurrence by Chief Judge KOZINSKI;
Dissent by Judge FISHER.

TALLMAN, Circuit Judge:

Scott Lynn Pinholster faces a death sentence in California for murdering Thomas Johnson and Robert Beckett on January 9, 1982, robbing Johnson and Beckett with intentional infliction of great bodily injury and with personal use of a knife, robbing Todd Croutch with a firearm, and burglarizing Michael Kumar's residence. The jury found two special circumstances: Pinholster, in the same proceeding, was convicted of more than one murder, Cal.Penal Code § 190.2(a)(3) (1984), and he committed the murders during a robbery and a burglary, *id.* § 190.2(a)(17)(i), (vii). The jury fixed Pinholster's penalty at death, and on June 4, 1984, the Los Angeles County Superior Court so sentenced him.

On automatic appeal, the California Supreme Court, in an opinion written by Justice Stanley Mosk, set aside one multiple-murder special-circumstance finding but otherwise affirmed the judgment. *See*

People v. Pinholster, 1 Cal.4th 865, 4 Cal.Rptr.2d 765, 824 P.2d 571 (1992). Pinholster sought a writ of habeas corpus. He challenged his convictions and death sentence. The California Supreme Court summarily denied Pinholster's state petition for habeas corpus. Pinholster filed a federal habeas corpus petition but the district court dismissed it when the parties stipulated that the petition contained unexhausted claims. Pinholster returned to state court to exhaust those claims. On October 1, 1997, the California Supreme Court denied Pinholster's second habeas petition.

Pinholster then filed an amended federal habeas petition and requested an evidentiary hearing on several claims. The district court granted the State's motion for summary judgment on Pinholster's claims challenging the constitutionality of his convictions. Pinholster appeals the district court's denial of his request for an evidentiary hearing on his guilt phase ineffective assistance of counsel claims. However, the district court concluded that his counsel inadequately investigated and deficiently presented mitigating evidence at the penalty phase and granted Pinholster's habeas petition with respect to the death penalty. The State cross-appeals the district court's judgment setting aside Pinholster's death sentence.

We affirm the district court's denial of an evidentiary hearing on Pinholster's claims of ineffective assistance during the guilt phase. We reverse the district court's grant of habeas relief on Pinholster's death sentence.

I

A

On January 9, 1982, Pinholster fatally stabbed the victims, Johnson and Beckett, during Pinholster's burglary of Kumar's residence.[1] *Pinholster*, 4 Cal.Rptr.2d 765, 824 P.2d at 582. Kumar was a known drug dealer and acquaintance of Pinholster. Charles Kempf, another acquaintance of Pinholster, testified that in mid-December 1981, Pinholster suggested to Kempf and three others that they rob Kumar of his drug stash.[2] *Id.* According to Kempf, Pinholster considered Kumar "an easy mark." *Id.* The five went to Kumar's home, but soon aborted the plan. Kumar was not home during the December visit, and they preferred to gain access through Kumar rather than break in. *Id.* Kempf testified that Pinholster carried a buck knife, and Pinholster claimed he would get Kumar's drugs "one way or the other." In addition, Kempf testified that Pinholster bragged about having stabbed someone in the rectum during a previous robbery. *Id.*

Art Corona-an accomplice in the crimes-served

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[1] We extract many of the facts and procedural history from the California Supreme Court opinion affirming Pinholster's convictions and death sentence on direct appeal, *Pinholster*, 1 Cal.4th 865, 4 Cal.Rptr.2d 765, 824 P.2d 571, which are confirmed by our own independent review of the record.

[2] Kempf had a previous conviction for receiving stolen property and was under arrest when he first talked with the police. He told the jury that the authorities did not promise leniency or other benefits in return for his testimony. *Pinholster*, 4 Cal.Rptr.2d 765, 824 P.2d at 582.

as the State's primary witness. He testified that on January 8, 1982, he attended a social gathering at Pinholster's apartment complex. *Id.* Corona agreed to help Pinholster and co-defendant Brown rob Kumar. *Id.* En route, Corona drove the two in his car and stopped at Lisa Tapar's residence. *Id.* Pinholster wanted Tapar to help them gain access to Kumar's residence. *Id.* After Tapar refused to allow Pinholster into her apartment, he used his buck knife to vandalize the door of her apartment and the hood of her car. *Id.* Tapar, her father, and another witness corroborated Corona's version of this incident. The group then left Tapar's apartment to burglarize Kumar's residence.

Corona testified about the events that took place during the burglary. Pinholster gained entry by breaking a window in the rear of the home and Brown entered through an open sliding-glass door. *Id.* at 582-83. The three ransacked the house. *Id.* at 583. Pinholster found marijuana in a bedroom and spilled a green substance in the kitchen. *Id.* At this time, victims Johnson and Beckett (Kumar's housesitters) arrived, opened the front door, discovered the crime, and shouted they would call the police. The three burglars attempted to leave through the rear sliding-glass door, but Johnson and Beckett came around to the back. As Johnson tried to enter, Pinholster stabbed Johnson in the chest three to four times with the knife. The California Supreme Court summarized Corona's description of the robbery, stabbing, and murders as follows:

> [Pinholster] backed [Johnson] out of the house and onto the patio, demanding drugs and money and repeatedly

> striking him. Johnson dropped his wallet on the ground and obeyed [Pinholster's] order to sit. Then Beckett approached, and [Pinholster] attacked him. Corona saw that [Pinholster] was stabbing Beckett, striking him in the chest as Corona had seen [Pinholster] strike Johnson. [Pinholster] repeatedly stabbed Beckett, again demanding money and drugs. [Pinholster] picked up Johnson's wallet and took a wallet from Beckett's pocket. [Pinholster] repeatedly kicked Beckett in the head. Corona then saw codefendant Brown stabbing Johnson in the chest. The three men withdrew, and Corona drove them back to [Pinholster's] apartment. Brown and [Pinholster] commented that they had "gotten them good," and Brown said he had "buried his knife to the hilt" in Johnson.

Id.

After the murders, the three returned to Pinholster's apartment and split the proceeds. Pinholster washed his knife and a woman named Debbie washed Brown's knife. *Id.* The next day, Pinholster telephoned Corona and told him to "lie low." Two weeks later, Corona turned himself in and gave a statement to the police. Corona testified at trial consistent with his earlier statement except that at trial he also mentioned seeing Brown stab Johnson and that he, Brown, and Pinholster divided the proceeds. *Id.*

Casey Corona, Art Corona's wife, was at

Pinholster's apartment when Pinholster, Brown, and Art Corona returned from Kumar's house. At trial, Casey corroborated Corona's testimony about the planning, execution, and cover up of the robbery/murders. She testified that she saw Pinholster wash blood off his knife and she heard him say: "It had to be done the way it was done. We had to do what we had to do." *Id.* Police had recently arrested Casey on a drug charge, and she testified that the prosecution assisted her entry into a diversion program.

Art Corona also testified that Pinholster had threatened him on numerous occasions. Specifically, prior to the preliminary hearing, Pinholster threatened to "blow up" Corona on his way to court if Corona testified against him. Pinholster impeached Corona with Corona's prior burglary conviction and Corona's admission that he was a professional burglar. *Id.*

The State introduced physical evidence to corroborate Pinholster's presence in Kumar's residence after it had been ransacked. Corona testified that Pinholster wore jeans and boots on the night of the murders. Police found boots with microscopic blood stains and a towel with a blood stain in Pinholster's apartment. Police also found a pair of jeans with a blood stain; however, investigators could not confirm whether the blood was human. In addition, when police arrested Brown, he had a buck knife with dimensions that corresponded to one of Johnson's stab wounds. *Id.* at 583-84. Investigators also discovered traces of human blood near the hilt of Brown's knife. The police found human blood on the inside forearm of the sleeve of

Corona's shirt, but they found no blood on his knife. *Id.* at 584.

Pinholster presented an alibi when he testified in his own defense at trial. He characterized himself as a "professional robber" who used guns while preying on drug dealers, not a murderer who used knives. He boasted of being a "very good robber," claiming that he had committed "hundreds" of robberies and that he had only been caught by the authorities one time. To support his defense, Pinholster admitted to robbing Thomas Croutch at gunpoint on another occasion, and having planned to rob Kumar, but denied having recruited Kempf and the three other individuals to do so. Pinholster also admitted to breaking into Kumar's house on the night of the murders.

By way of his alibi, Pinholster claimed he had thrown a party in memory of his best friend, "Shotgun," on the night of the murders. *Id.* He testified that around 8 p.m. he left the party and went to Kumar's house, broke a window, and gained access through the kitchen. He took a bag of marijuana, touched a bluish substance in a bedroom, and spilled a bag with green material in the kitchen. He denied ransacking the house or killing anyone.[3] *Id.* Pinholster said he had returned to his house around 9 p.m., and smoked a considerable amount of

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[3] During rebuttal, the state called Eric Klemetti who testified that he had purchased marijuana from Johnson at the Kumar residence at 9 p.m. He claimed that the house was not ransacked and everything was in order. *Pinholster,* 4 Cal.Rptr.2d 765, 824 P.2d at 585.

marijuana and consumed a lot of alcohol. Around 11:30 p.m., Corona asked Pinholster for an ounce of marijuana to sell. Pinholster said he gave Kumar's address to Corona in exchange for a third of whatever drugs Corona took from Kumar's house. Corona could not find Kumar's residence and returned around 1 a.m. Pinholster gave him the directions again, and around 1:30 a.m. Pinholster went to Tapar's house to tell her that "Shotgun" had died.[4] *Id.* at 585. He admitted to stabbing her door and carving a swastika and lightning bolt on her car after she refused to admit him. Pinholster claimed that he returned to his apartment around 2 a.m., and Corona returned around 4 a.m. Pinholster's brother and several friends corroborated his version of the events. The superior court jury by its verdict obviously rejected Pinholster's alibi defense.

The State sought the death penalty. On March 22, 1983, the prosecution mailed a California Penal Code section 190.3 letter to Pinholster at the Los Angeles County Jail, notifying him that the State intended to offer aggravating evidence at the penalty proceedings. Pinholster and his counsel[5] contended

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[4] On rebuttal, Tapar contradicted Pinholster when she testified that Pinholster arrived at her house in Corona's car, not his own as he had said. She also claimed not to have known "Shotgun," giving Pinholster no reason to discuss his death with her.

[5] Between April 20, 1982, and January 19, 1983, court-appointed counsel Marvin Part represented Pinholster. Attorney James Armstrong was appointed in his place in January 1983. Pinholster requested to proceed without counsel, and from March 17, 1983, to July 13, 1983, Pinholster represented himself. On July 12, 1983, the Los

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they were not informed of the letter until the guilt phase concluded on April 24, 1984. Pinholster moved to exclude aggravating evidence based on the prosecution's failure to comply with California Penal Code section 190.3. The court denied the motion.[6] Rather than move to continue the penalty phase-a request the state trial court indicated it would grant-Pinholster's counsel (Brainard and Dettmar) elected to proceed. The penalty phase began on May 1, 1984. The court instructed the jury on May 2, 1984, and the jury returned a verdict of death on each of the two murder counts on May 7, 1984.

The prosecution called eight penalty phase witnesses. First, Jack Taube, Pinholster's juvenile probation officer, testified that Pinholster had previously struck a bailiff without cause after a court proceeding. Several bailiffs had to physically restrain Pinholster, and, as Pinholster left the proceeding, he continued to orally threaten the wounded bailiff. Taube also testified about Pinholster's involvement in juvenile gangs. Second, Los Angeles Police Department ("LAPD") patrol officer David Kaufman

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Angeles County Superior Court appointed Harry W. Brainard after Pinholster changed his mind. On December 20, 1983, the superior court also appointed Wilbur G. Dettmar as second counsel under California Penal Code section 1095. Brainard and Dettmar represented Pinholster during the guilt and penalty phases of his trial.

[6] On state habeas review, the Los Angeles County Superior Court held an evidentiary hearing and determined that Pinholster, while representing himself pre-trial, received actual notice of the State's intent to seek the death penalty. Pinholster does not challenge that finding here.

testified that shortly after he and his partner responded to a fight involving Pinholster, Pinholster appeared to fake an epileptic seizure. Officer Kaufman also testified that once handcuffed, Pinholster became belligerent and threatened to kick the officers. After the officers transferred Pinholster to a facility for possible medical treatment, and upon removing Pinholster's leg restraints, Pinholster kicked Officer Kaufman in the head.

Third, Ernest Guzman, another LAPD officer, testified that after refusing to enter his police vehicle on a different occasion, Pinholster seemingly faked an epileptic seizure. After the officers placed Pinholster in the police car he became violent, kicking at Officer Guzman's head. After Pinholster told the officers that he had a knee injury, they transported him to Valley Receiving Hospital for an evaluation. During that time, Pinholster spat in Guzman's partner's face, and refused to allow doctors to examine his knee. Pinholster kicked and broke one of the glass panes in the x-ray machine. Fourth, Deputy Sheriff Michael Loper testified to having "numerous run-ins" with Pinholster in a Los Angeles County Jail. Pinholster struck Loper as he assisted another deputy in gaining control over Pinholster, who had refused to comply with jail rules.

Fifth, Operations Sergeant Thomas Piggott testified about Pinholster's violent reputation and disciplinary record at the Los Angeles County Central Jail. He described eleven documented incidents of Pinholster's violence or recalcitrance and stated that Pinholster had a reputation of throwing cups of urine at the deputies as they walked by his cell. Piggott also testified that he tried to counsel

Pinholster, but Pinholster insisted that he wanted to go to prison. Piggott recalled Pinholster saying, "They better send me now, because if they don't I'll just go out on the streets and do something to get back in, go to prison."

Sixth, Theodore Mesquita testified about fighting with Pinholster over a woman Mesquita dated, which resulted in Pinholster cutting Mesquita's arm with a straight razor, requiring approximately fifty stitches. Pinholster's wife, Cathy Ann Smith, testified that Pinholster once broke her jaw while seeming to have an epileptic seizure. Finally, Sheriff's Sergeant Joseph Barrett testified that Pinholster told Barrett he would kill Art Corona when released from prison.

In addition, to minimize the inconvenience of gathering witnesses from San Luis Obispo, Pinholster's counsel stipulated that (1) Pinholster's prior kidnaping conviction involved a knife, but that no plea bargain governed the knife use allegation (Pinholster admitted to carrying the knife and placing it at the victim's throat), and (2) Pinholster committed numerous prison disciplinary infractions, including throwing urine at and threatening various corrections officers. Counsel stipulated that Pinholster threatened to stab a corrections officer and to throw another corrections officer off of the prison tier. Pinholster's disciplinary infractions resulted in the Director of Corrections ordering Pinholster to be placed on a special disciplinary diet for a nine-day period in 1979, a procedure reserved for only the most disruptive inmates.

Pinholster's counsel, Dettmar, waived making

an opening statement in the penalty phase of his trial and immediately called Pinholster's mother, Burnice Brashear. She testified about Pinholster's strained relationship with his step-father, Bud Brashear; Pinholster's head injury at age two and one-half years when she ran over him with her car; his head injury shortly thereafter when his head cracked the windshield during a car accident; his disruptive behavior at school; a psychologist's recommendation that Pinholster be committed to a mental hospital when he was ten; his time in a class for the emotionally handicapped; his view of himself as a neighborhood Robin Hood because he stole things to distribute to the neighborhood children; his frequent stays at boys' homes, juvenile halls, and juvenile camps; and his epilepsy, which she believed resulted from a severe beating at age eighteen in county jail.

C

Following Pinholster's unsuccessful direct appeal, he initiated habeas proceedings in state and federal court. We detail his submissions with regard to his penalty phase ineffective assistance of counsel claim because the State contends that, by the time of the federal evidentiary hearing, this claim had transmogrified into a completely new theory for which Pinholster now relies on yet a third set of mental health experts.

1

Pinholster raised fifty claims for relief in his state habeas petition. Relevant to this appeal, Pinholster claims his counsel provided ineffective

assistance at the guilt and penalty phases of his trial. Regarding his death sentence, he argues that his trial counsel unreasonably failed to investigate, prepare, and present mitigating evidence, and unreasonably presented evidence that hurt his mitigation case. Had his counsel investigated mitigating evidence, he contends, his lawyers would have uncovered a wealth of mitigating evidence-a turbulent, dysfunctional, violent and abusive home life; serious, well-documented educational disabilities; and profound mental disorders. To support this claim, Pinholster submitted declarations from family members and from his trial attorney, Brainard; various medical, legal, and school records of Pinholster and his relatives; and a declaration obtained during habeas proceedings from psychiatrist Dr. George Woods.

Dr. Woods diagnosed Pinholster with a long standing bipolar mood disorder with psychotic features. Dr. Woods opined that, during the murders, Pinholster was substantially impaired by a bipolar mood disorder operating synergistically with a seizure disorder.[7] Dr. Woods also criticized Dr. John Stalberg's psychiatric evaluation. Dr. Stalberg had previously examined Pinholster at defense counsel's request on March 11, 1984, after trial began. He reviewed case materials supplied by counsel, including police reports and a probation report. Dr. Stalberg concluded that Pinholster did not manifest by history any significant signs of mental disorder or defect other than Antisocial Personality Disorder.[8]

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[7] "Seizure disorder" is the medically preferred term for what is commonly known as epilepsy.

[8] The Diagnostic and Statistical Manual of

(continued...)

Dr. Stalberg stated he saw no mitigating evidence, and defense counsel decided not to pursue this issue at the time. Habeas counsel disavowed Dr. Stalberg as a credible expert after retaining Dr. Woods to criticize Dr. Stalberg's mid-trial evaluation of Pinholster.

After the parties filed briefing in the state habeas case, the California Supreme Court issued an order to show cause, but subsequently vacated it as "improvidently granted." The court then denied the writ "on the substantive ground that it is without merit." The California Supreme Court also denied several other claims on procedural grounds.

2

In Pinholster's first federal habeas petition, he continued to maintain that his trial counsel unreasonably failed to investigate, prepare, and present mitigating evidence during the penalty phase. This time, however, Pinholster switched

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(...continued)
Mental Disorders (DSM), DSM-III, the American Psychiatric Association's handbook in effect in 1984 for diagnosing mental disorders, describes Antisocial Personality Disorder as a personality disorder with a history of continuous and chronic antisocial behavior in which the rights of others are violated, persistence into adult life of a pattern of antisocial behavior that began before the age of 15, and failure to sustain good job performance over a period of several years. Lying, stealing, fighting, truancy, and resisting authority are typically prevalent in early childhood, and in adulthood these kinds of behavior continue and include the failure to accept social norms with respect to lawful behavior.

tactics and renamed Dr. Stalberg as his psychiatric expert. In April 1997, Pinholster's habeas counsel asked Dr. Stalberg to review additional materials pertaining to Pinholster and his family. Dr. Stalberg reviewed the materials and spoke with several of Pinholster's family members. Dr. Stalberg then concluded that knowledge of Pinholster's family history of severe psychiatric disorders, Pinholster's disturbed behavior during childhood, and his irrational and highly aggressive actions immediately before the homicides would have caused him to inquire further before concluding that Pinholster merely had a personality disorder. Dr. Stalberg also would have inquired further to determine if the homicides related to a mental impairment caused by organic/neurological dysfunction. Dr. Stalberg now declared that the new information he reviewed would have materially modified his previous opinion regarding mitigating circumstances, and that his review now demonstrated the existence of voluminous mitigating evidence.

Because the declaration contained new material facts, the parties stipulated that certain claims, including the penalty phase ineffective assistance of counsel claim, were unexhausted. The district court allowed Pinholster to exhaust the claims in state court.

3

Pinholster filed a copy of his federal petition and Dr. Stalberg's new declaration in the California Supreme Court. The court denied Pinholster's petition "on the substantive ground that it was without merit" and denied other claims on procedural

grounds.

4

Pinholster filed a "First Amended Petition for Writ of Habeas Corpus" in federal court on November 14, 1997. On April 13, 1999, Pinholster filed a request for a federal evidentiary hearing. Applying pre-Antiterrorism and Effective Death Penalty Act ("AEDPA") standards, the district court granted an evidentiary hearing on Pinholster's penalty phase ineffective assistance of counsel claim, and two other claims not relevant to this appeal.[9]

Dr. Stalberg anticipated testifying as a witness at the federal evidentiary hearing. Pinholster submitted two new declarations from Dr. Stalberg to support his amended federal habeas petition. The first, dated January 24, 2000, explained that it was Dr. Stalberg's custom and practice in 1984 when retained by defense counsel in a capital case to form an opinion about a defendant's mental state during the offense and to identify mitigating circumstances. The second, dated June 5, 2001, expanded upon and specified the factual bases for the opinions Dr. Stalberg previously presented to the district court. In July 2001, the State Attorney General's Office deposed Dr. Stalberg. The Deputy Attorney General questioned Dr. Stalberg about his earlier declarations, and Pinholster's counsel asked Dr.

[9] At this time, the district court also granted the State's motion for summary judgment on select claims, including Pinholster's claims of ineffective assistance of counsel at the guilt phase discussed in section III of this opinion.

Stalberg to elaborate on various aspects of his opinions, and to express his opinions about Pinholster's mental health.

Dr. Stalberg testified that the additional materials he reviewed did not alter his conclusion that Pinholster suffers from Antisocial Personality Disorder. As a result of this damaging testimony, on May 9, 2002, Pinholster's current counsel, the Federal Public Defender, advised Dr. Stalberg that he would no longer call him as a witness during the evidentiary hearing, and he no longer considered Dr. Stalberg to be Pinholster's expert.

The district court nonetheless proceeded with an evidentiary hearing in September 2002. The Federal Public Defender's Office now utilized two new experts-Dr. Sophia Vinogradov and Dr. Donald Olson-to bolster Pinholster's penalty phase ineffective assistance of counsel claim. Dr. Vinogradov and Dr. Olson both submitted declarations as direct testimony at the evidentiary hearing. Dr. Vinogradov concluded that Pinholster suffered "personality change, aggressive type, due to serious childhood head trauma." Dr. Olson, a pediatric neurologist, testified that Pinholster likely suffered brain damage from two head injuries in his early childhood, which created a risk of epilepsy.

On March 25, 2003, the district court granted Pinholster's habeas petition and vacated his death sentence. The district court noted that Pinholster's attorneys admitted they had not "prepared any evidence by way of mitigation," yet trial counsel declined an offer for a penalty phase continuance to prepare extenuating evidence. The district court

further reasoned that trial counsel called one witness-Pinholster's mother-and her testimony was damaging, incomplete, and inaccurate. The district court found Pinholster's attorneys' performance deficient because they failed to adequately investigate mitigating evidence and lacked a reasonable strategic decision for their failure. The district court ultimately found prejudice based on the significant evidence of Pinholster's childhood abuse and mental impairments, combined with the prosecutor's emphasis during summation on the lack of mitigating evidence and the length of the jury's deliberations.

The district court revisited its March 25, 2003, Order Granting Writ of Habeas Corpus, after determining that AEDPA applied under *Woodford v. Garceau*, 538 U.S. 202, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003). The Supreme Court filed *Woodford* on the same day the district court had filed its Order. The district court nonetheless concluded that: (1) Pinholster timely filed his federal habeas petition; (2) Pinholster was entitled to an evidentiary hearing under AEDPA; and (3) AEDPA did not affect its Order granting Pinholster habeas relief because the California Supreme Court "did not adjudicate Pinholster's claim that counsel was ineffective for failing to investigate and present mitigating evidence at the penalty phase."

II

We review de novo the district court's decision to grant or deny a petition for writ of habeas corpus. *Lambert v. Blodgett*, 393 F.3d 943, 964 (9th Cir.2004). We review factual findings and credibility

findings made in the context of granting or denying the petition for clear error. *Id.*

Neither party disputes that AEDPA now governs Pinholster's petition. AEDPA requires us to defer to the state court's determination of federal issues, unless that determination resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1).[10] Deference to state court decisions applies only to claims the state court adjudicated on the merits.[11] *Lambert*, 393 F.3d at

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[10] The court may also grant a petition where the state court adjudication of a claim is based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(2). We will address § 2254(d)(2) only when applicable to Pinholster's appeal.

[11] The district court incorrectly concluded that the California Supreme Court's decision disposing of Pinholster's penalty phase ineffective assistance of counsel claim was not an adjudication on the merits entitled to deference. The California Supreme Court's denial of a habeas petition without comment or citation constitutes a decision on the merits of the federal claims. *See Hunter v. Aispuro*, 982 F.2d 344, 347-48 (9th Cir.1992); *see also Gaston v. Palmer*, 417 F.3d 1030, 1038 (9th Cir.2005). Though we would ordinarily look through the California Supreme Court's summary denial to the "last reasoned decision [in the state court system]," *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n. 2 (9th Cir.2000), no other state court determination addresses ineffective assistance of counsel at the penalty phase. Absent a last-reasoned state court decision on this claim, we must "perform an 'independent review of the record' to ascertain whether the state court decision was objectively unreasonable." *Himes v. Thompson*, 336

(continued...)

965. De novo review applies if the state court did not reach the merits of a particular issue. *Lewis v. Mayle*, 391 F.3d 989, 996 (9th Cir.2004).

A decision is "contrary to" federal law when the state court applies a rule of law that contradicts the governing law set forth in Supreme Court precedent or when the state court makes a determination contrary to a Supreme Court decision on materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A state court unreasonably applies federal law when its application of Supreme Court precedent to the facts of petitioner's case is objectively unreasonable. *Id.* at 409, 120 S.Ct. 1495.

III

We first address Pinholster's appeal of the district court's grant of summary judgment in favor of the State on his claims of ineffective assistance of counsel during the guilt phase of his trial. Pinholster seeks an evidentiary hearing, arguing that he has provided a colorable claim that his counsel performed deficiently. His primary contention is that his counsel failed to adequately investigate the State's physical evidence placing him at the scene during the murders and this resulted in an uninformed decision to have Pinholster testify in his own defense. *See United States v. Curtis*, 742 F.2d 1070, 1076 (7th

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F.3d 848, 853 (9th Cir.2003) (quoting *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir.2000)); *see also Greene v. Lambert*, 288 F.3d 1081, 1089 (9th Cir.2002).

Cir.1984) (per curiam) ("When a defendant asserts that he desires to exercise his constitutional right to testify truthfully, counsel's duty is to inform the defendant why he believes this course will be unwise or dangerous.").

At the time the California Supreme Court rendered its last decision-October 1, 1997-the Supreme Court's two-part standard for analyzing ineffective assistance of counsel was clearly established law. *See Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish a Sixth Amendment violation, Pinholster had to show that: (1) his counsel's performance was deficient, i.e., it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced him. *Id.* In reviewing counsel's performance, we "must be highly deferential" and should make every effort "to eliminate the distorting effects of hindsight." *Id.* at 689, 104 S.Ct. 2052. Even if we conclude that counsel performed deficiently, to obtain relief the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052.

A

To satisfy the first prong of *Strickland,* Pinholster must "identify [ ] the acts or omissions 'that are alleged not to have been the result of reasonable professional judgment.'" *Earp v. Ornoski,* 431 F.3d 1158, 1173-74 (9th Cir.2005) (quoting

Strickland, 466 U.S. at 690, 104 S.Ct. 2052). The State offered during its case-in-chief the following pieces of physical evidence to corroborate Corona's testimony and place Pinholster at the scene of the crime at the time of the murders: (1) investigators found dried blood on the bottom of the boots taken from Pinholster's closet and the sole print matched a bloody boot print near the victims' bodies; and (2) investigators found a palm print matching Pinholster's print located within the Kumar residence.[12] Pinholster contends that trial counsel's failure to investigate this evidence constituted deficient performance, leading to an ill-advised decision to have Pinholster testify in his own defense, during which he admitted to several incriminating facts.

Assuming trial counsel's failure to investigate the physical evidence fell below the objective standard of reasonableness, we nevertheless conclude that the district court properly granted the State's motion for summary judgment because Pinholster failed to raise a colorable claim that the deficient performance prejudiced him. *See Strickland*, 466 U.S.

[12] Pinholster requests that we take judicial notice of the following documents to support his assertion that the State unlawfully destroyed all of the physical evidence after trial: (1) an excerpt of the Master Index with a list of the State's physical evidence; (2) a certificate from the Los Angeles County Superior Court ordering the exhibits listed on the "non-valuable exhibit" list destroyed; and (3) the "non-valuable exhibit" list. We deny his request as these documents are not relevant to the resolution of this appeal. *See Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1025 n. 2 (9th Cir.2006).

at 697, 104 S.Ct. 2052 (stating that a court may presume ineffective assistance to dispose of a claim on prejudice grounds).

At the homicide scene, the police detectives discovered boot prints left in blood near the victims' bodies. When executing the search warrant for Pinholster's apartment, homicide detectives found a pair of black boots that appeared to have tread marks that were similar to the prints left at the scene. Testing revealed microscopic stains on the boots that gave positive reactions for blood. Specifically, investigators detected blood in all of the crevices of the right boot. Criminalist Steven Schliebe also testified that the treads on the boots taken from Pinholster's apartment were consistent with the treads that left the boot prints at the crime scene.

During cross-examination of Detective Coffey-the detective who discovered the boots in Pinholster's apartment-Pinholster's counsel asked whether the boots had a common tread. The detective responded, "I'm not a boot expert, but I had not seen this type of tread on boots. I have seen other types of tread. Not to say it's not common or uncommon. To me, I have not seen that type of tread before." In his habeas petition, however, Pinholster offered a declaration from Criminalist Schliebe that stated otherwise: Schliebe declared that, "had he been asked if the sole pattern [of Pinholster's boots and the boot prints found at the crime scene were] common in the Southern California area," he would have answered, "the shoe sole pattern is fairly common and is frequently found on work and sport boots."

The district court denied Pinholster's claim of

ineffective assistance of counsel for lack of prejudice. It reasoned that "the boot that was found in [Pinholster's] home had a trace of blood on it[,] which distinguishes it from other boots with the same tread." The district court also denied Pinholster's claim that trial counsel were ineffective for eliciting Detective Coffey's opinion that the boot print was uncommon. It reasoned that Detective Coffey "never testified that the boot print was uncommon"; rather, he "stated that he had not seen the sole pattern before" and "clarified that he was not a boot print expert."

The second piece of physical evidence was a palm print lifted from a closet door frame in the Kumar residence that matched a palm print later taken from Pinholster. During direct examination, the fingerprint expert testified that he conducted two prior identification attempts before he was able to conclusively determine that the print lifted from the door matched Pinholster's. The expert explained that the palm print lifted from the closet door came from the far outside portion of the left palm. In the two prior attempts, the lab used exemplar cards that excluded the outside portion of the palm. Normally, when a person is palm printed, the palm is laid flat on the exemplar card. Therefore, as the expert testified, "it was not until [Detective] Coffey provided [his] office with this exemplar card with the palm prints, and also a roll of the far left-hand side, that [he was] able to find the area that matched up with the print that [he] lifted from the door frame."

Pinholster argues that his trial counsel were ineffective for failing to independently test the palm print. In support of his argument, Pinholster offered

a declaration of an independent fingerprint expert, Clarence Collins. After examining both the lifted print and the rolled palm print taken from Pinholster, Collins concluded that the prints "were not made by the same person." In addition, Pinholster offers a declaration taken from Brainard stating that, "[h]ad I known Scott Pinholster did not deposit the latent print found at the Kumar residence, I would have conducted the defense differently, and would have appropriately changed my advice to my client. I probably would have advised Scott Pinholster not to testify during [the] guilt phase."

The district court denied Pinholster's request for an evidentiary hearing on the basis that he again failed to show prejudice. First, Pinholster admitted that he was inside Kumar's residence on the night of the murders. Second, Pinholster's trial counsel merely stated that he *probably* would have advised Pinholster not to testify.[13] This does not necessarily

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[13] We are not holding, nor do we think the district court found, that Pinholster's counsel's statement that he "probably" would not have advised Pinholster to testify is sufficient to establish that counsel's failure to investigate was non-prejudicial. *See* Dissent Op. at 776 n. 2. Indeed, Pinholster uses counsel's declaration to argue that he *was* prejudiced. Pinholster argues that had his trial counsel investigated the palm print he would have known there was a discrepancy and therefore never would have advised Pinholster to testify. Pinholster argues that without his testimony there was no evidence that he was in Kumar's residence at the time of the murders and therefore counsel's failure to investigate *was* prejudicial. As we discuss *infra* these arguments are simply unpersuasive as there was a wealth of

(continued...)

show that Pinholster's admission would not otherwise have been made. The record is quite clear that Pinholster was eager to take the stand so he could convince the jury that, although he saw himself as a professional thief who preyed on drug dealers, his modus operandi was to carry a gun, not to stab his victims with knives.

We agree with the district court and hold that Pinholster failed to show a colorable claim that he was prejudiced by trial counsel's alleged failure to independently investigate the State's physical evidence. Despite Pinholster's contention, Collins's declaration does not prove that the State's fingerprint expert was lying or misinformed. At most, it creates a battle of the experts.[14] Moreover, the jury heard the State's fingerprint expert testify that he could not match Pinholster's print until the third attempt. Although Pinholster argues that the "State's expert was pressured to find a match," no evidence supports such a contention. In addition, the State presented the palm print evidence to place Pinholster in the Kumar residence at the time of the murders. This evidence was cumulative as Corona testified

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(...continued)
other evidence proving Pinholster's presence in the Kumar residence.

[14] Contrary to the dissent's assertion, we are not saying that the existence of a "battle of the experts" reduces any prejudice resulting from counsel's failure to investigate the palm print. *See* Dissent at 776 n. 2. We are simply saying that Collins's declaration creates only a battle of the experts; it does not prove Pinholster's contention that the State's expert was misinformed, improperly influenced, or lying.

that Pinholster was in the Kumar residence at the time of the murders, and substantial portions of Corona's testimony were corroborated by Lisa Tapar, her father, and Casey Corona. Pinholster's admission to the jury that he was inside Kumar's house at some point that night further convinces us that the alleged ineffectiveness did not prejudice him. Therefore, we hold that the jury's verdict would not have been affected even if Pinholster's trial counsel had conducted an independent investigation and introduced evidence that the palm print was not Pinholster's.

Pinholster also failed to show a colorable claim that he was prejudiced by trial counsel's failure to investigate the boot prints. The State did not argue that this evidence connected Pinholster to the crime because the sole prints were unique; rather, the state argued that this evidence connected Pinholster to the crime scene because (1) the sole prints were consistent, *and* (2) Pinholster's boots were found to have traces of human blood on the bottom. Therefore, even if the jury heard evidence that the sole prints were common in Southern California, this would not have changed the verdict. Pinholster offers no other evidence to suggest that the boot print evidence was faulty.

2

Because we conclude that Pinholster failed to raise a colorable claim that he was prejudiced by trial counsel's failure to investigate the State's physical evidence, we cannot conclude that trial counsel's decision to advise Pinholster to testify in his own defense amounted to ineffective assistance. The

dissent is ensnared in the trap of 20/20 hindsight. It fails to give a sufficient level of deference to counsel's judgments given the evidence and the type of defense Pinholster wanted to pursue. *See Rompilla v. Beard*, 545 U.S. 374, 381, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) ("In judging the defense's investigation, as in applying *Strickland* generally, hindsight is discounted by pegging adequacy to counsel's perspective at the time investigative decisions are made and by giving a heavy measure of deference to counsel's judgments." (internal quotation marks and citation omitted)).

"An accused's right to testify is a constitutional right of fundamental dimension." *United States v. Joelson*, 7 F.3d 174, 177 (9th Cir.1993). When reviewing ineffective assistance of counsel claims that question the attorney's trial strategy, it is important to "note that a defendant's Sixth Amendment rights are his alone, and that trial counsel, while held to a standard of 'reasonable effectiveness,' is still only an *assistant* to the defendant and not the master of the defense." *Mulligan v. Kemp*, 771 F.2d 1436, 1441 (11th Cir.1985). The reasonableness of counsel's chosen trial strategy depends critically "on informed strategic choices made by the defendant and on information supplied by the defendant." *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. The record amply demonstrates that this strategic tactical decision was deliberate and considered. Pinholster actively participated in all key decisions, as he represented himself pro se at one point before the trial, and strongly directed the strategy he wished counsel to pursue.

The record shows that Pinholster directed his trial counsel to pursue an alibi defense on his behalf. On June 24, 1983, the trial court held a hearing on a motion to dismiss filed by Pinholster while representing himself. Pinholster argued that his first appointed trial counsel, Marvin Part, coerced him into waiving his right to a speedy trial. During the hearing, Pinholster called Part to testify, waiving his attorney-client privilege. Pinholster questioned why Part refused to interview possible alibi witnesses in the face of physical evidence linking Pinholster to the crime scene. Pinholster's insistent decision to pursue an alibi defense necessarily impacted his counsel's trial strategy.[15] Even without the physical evidence, the State presented overwhelming evidence that Pinholster was at the Kumar residence on the day of the murders. Corona's testimony not only placed Pinholster at the scene during the murders, but it also detailed Pinholster's participation in the murders. Several other witnesses corroborated Corona's testimony.

In light of the evidence placing Pinholster at the scene, Pinholster's failure to show prejudice from his trial counsel's failure to investigate the physical evidence, and Pinholster's strong desire to pursue an

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[15] Brainard declared:

> The strategy decided upon prior to trial was to demonstrate Scott committed robberies and not burglaries, and that Scott used guns, not knives, as weapons. I assumed Scott would admit to having committed a few robberies, not hundreds, although we never explicitly discussed the number. Part of [the] strategy decided upon prior to trial was to admit the Croutch robbery during trial.

alibi defense, we cannot second guess trial counsel's decision to advise Pinholster to testify.[16] In *Strickland*, the Court recognized that "[c]ounsel's actions are usually based ... on informed strategic choices made by the defendant and on information supplied by the defendant." 466 U.S. at 691, 104 S.Ct. 2052. To support Pinholster's alibi defense, trial counsel needed to explain the overwhelming evidence proving that Pinholster intended to rob the Kumar residence on the night of the murders. In other words, counsel needed Pinholster to tell his version of the events-that he was a robber, not a burglar, and that he used guns, not knives. Given the evidence presented by the State, trial counsel's tactical decision to advise Pinholster to testify was reasonable. *See id.* Such a decision does not amount to constitutionally deficient performance. To declare that it was wrong because in hindsight it proved unsuccessful and must have been uninformed is not what the Supreme Court intended when we analyze a *Strickland* claim after the fact.

B

We also conclude that Pinholster has failed to present a colorable claim that he was prejudiced by

[16] The dissent assumes that trial counsel never advised "Pinholster against testifying, because the jury would likely conclude he was lying." *See* Dissent at 777. There is a dearth of evidence in the record detailing any discussion between trial counsel and Pinholster about his decision to testify during the guilt phase. Pinholster does not allege, and there is no evidence to support, the dissent's assumption that trial counsel neglected to discuss the risks of testifying with their client.

the other alleged instances of ineffective assistance of counsel during the guilt phase of his trial.

I

One alleged instance concerned Art Corona's police interview. Through stipulation of counsel, the State introduced the unredacted tape recording and transcription of Corona's police interview. During the interview, Corona claimed that Pinholster admitted involvement in the shooting of two "wetbacks," that he had beaten an elderly woman, was involved in a cocaine "rip-off," sold drugs, committed robberies, and had affiliated with white supremacist prison gangs.[17]

The California Supreme Court rejected Pinholster's ineffective assistance of counsel claim, concluding that trial counsel had a "rational tactical reason" for deciding not to object to admission of the entire interview. *Pinholster*, 4 Cal.Rptr.2d 765, 824 P.2d at 604.[18]

The court reasoned that "[Pinholster] needed to create an impression of candor to carry his testimony that he had broken into the Kumar house on the night of the murder[s], but had stolen the

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[17] Trial counsel did not object to replaying the tape during deliberations, or allowing the jury to keep the transcript while deliberating.

[18] Unlike Pinholster's other ineffective assistance of counsel claims, the California Supreme Court reached the merits of this claim in the direct appeal. It therefore constitutes the "last reasoned decision" of the state court. *See Shackleford*, 234 F.3d at 1079 n. 2.

drugs and left before Corona arrived and stabbed the murder victims." *Id.* Pinholster himself testified about his violent criminal past and the references that Corona made to specific instances "simply confirmed what [Pinholster] was willing to say about himself." *Id.*

The California Supreme Court called Corona's reference to the Aryan Brotherhood "clearly innocuous," as Corona testified that it was Brown who was affiliated with the group, not Pinholster. *Id.* Moreover, the interview could reasonably be seen as favorable to Pinholster's defense. "[T]he tape contained statements inconsistent with Corona's trial testimony, showed Corona's eagerness to cooperate with the police, and contained some reference to Corona's *contact with one 'Butch,'* who [Pinholster] claimed was Corona's actual accomplice." *Id.* The district court denied Pinholster's motion for an evidentiary hearing because certain aspects of the tape were "beneficial to Pinholster's case" and therefore trial counsel "arguably were not deficient for failing to object to it." The district court concluded that admitting the tape was not prejudicial because the case against Pinholster was strong and the prosecution successfully discredited his defense.

Whether counsel's actions constituted a "tactical" decision is a question of fact, and we must decide whether the state court made an unreasonable determination of the facts in light of the evidence before it. *See Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir.2007) (en banc) (citing *Taylor v. Maddox*, 366 F.3d 992, 999-1000 (9th Cir.2004)). For the reasons expressed by the district court, we hold that the California Supreme Court's conclusion that

counsel made a tactical decision to admit the entire tape was not an unreasonable determination of fact. Accordingly, the court's conclusion that counsel made a *reasonable* decision was not objectively unreasonable. *See id.* (stating that the "reasonableness of counsel's decision is best described as a question of law").

2

Pinholster also claims his counsel were ineffective in failing to object to Detective Coffey's testimony. Detective Coffey testified that Terry Pinholster, Pinholster's brother, said Scott Pinholster's arrest was "no big deal" because his brother had been arrested for murder before. Pinholster argues that because he had never before been arrested or charged with murder, his trial counsel had no tactical basis for failing to object to this statement. The district court granted summary judgment to the State on this issue, concluding that Pinholster had failed to show prejudice as the jury had "already heard that [Pinholster] was involved in a shoot-out in which two 'wetbacks' had been killed. The jury could easily have surmised that [Pinholster] was arrested for murder as a result of that incident."

Trial counsel's failure to object to this evidence raises concerns. The portion of the Corona tape discussing the "wetback" murders and the hearsay statement of Pinholster's brother undermine the heart of Pinholster's defense-that he is a robber not a murderer. Nevertheless, because the California Supreme Court's decision regarding the Corona tape was objectively reasonable, it cannot be said that Pinholster suffered prejudice from admission of his

brother's statement. As the district court reasoned, it is likely the jury put the two together, making his brother's statement no more prejudicial than admission of the "wetback" statement.

3

Pinholster contends that his trial counsel were ineffective by admitting into evidence a prior felony conviction for kidnaping after the trial court granted a motion in limine to prohibit the State from using the evidence on cross-examination. In a declaration filed with Pinholster's state and federal habeas petitions, Brainard admitted that he "d[id] not recall why [he] elicited Scott Pinholster's kidnapping conviction after the court ruled that this conviction was inadmissible for impeachment purposes."

Brainard's question opened the door for the prosecution to question Pinholster about prior offenses in which he used a knife rather than a gun. The trial court-without objection from Pinholster's attorneys-allowed the State to recall Pinholster to the stand and question him as to whether he used a knife during the course of the kidnaping. Pinholster testified that he pled guilty to using a knife but denied actually having used the knife during the commission of the offense. Although use of a knife is alleged in the criminal information, it was not a term of the plea agreement.[19] Brainard filed a declaration

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[19] The colloquy during the change of plea hearing went as follows:

The court: Mr. Pinholster, Count 1 of the information charges that on August 21st of last year you kidnapped a person named Jena, J-e-n-a, Rae, R-

(continued...)

stating that he could "not recall whether [he] knew the knife enhancement allegation was not found true."

We hold that Pinholster has failed to show a colorable claim that he was prejudiced by his trial counsel's allegedly deficient performance. The jury heard other evidence that Pinholster possessed knives, including his own admission that he used a buck knife to vandalize Lisa Tapar's car on the night of the murders. The district court properly denied Pinholster an evidentiary hearing on this ineffective assistance of counsel claim.

4

Charles Kempf testified that during an aborted robbery attempt at Kumar's residence Pinholster bragged about stabbing an unidentified individual in the rectum. Pinholster contends that his trial counsel were ineffective for failing to object to Kempf's statement and failing to impeach Kempf with a prior statement in which he claims that Pinholster's friend did the stabbing.

Pinholster cannot make out a colorable claim that he was prejudiced by the admission of this evidence. During his own testimony, which was dramatic and unusual in the candor Pinholster displayed in bragging about his life of crime,

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(...continued)
a-e, Burdett, B-u-r-d-e-t-t; that is, that you forcefully took her from one place to another. Do you understand that charge? Pinholster: Yes, sir. The court: Is that what you did? Pinholster: Yes, sir.

Pinholster admitted to several violent acts and the evidence presented against him was overwhelming. The California Supreme Court so found, *see Pinholster*, 4 Cal.Rptr.2d 765, 824 P.2d at 601, 604, and we cannot say that the district court erred by failing to grant an evidentiary hearing.

5

During rebuttal, Eric Klemetti testified that he purchased marijuana from Johnson at the Kumar residence around 9 p.m. on the night of the murders. To impeach his credibility, Pinholster's trial counsel asked Klemetti whether he had ever committed a burglary with Pinholster, and whether he had acted as an informant during that case. Pinholster argues that this amounted to ineffective assistance because the conviction undercut his testimony that he committed robberies rather than burglaries and was otherwise inadmissible.

We agree with the district court. Trial counsel made a rational tactical decision to impeach Klemetti's testimony with this evidence as the witness would have otherwise gone unchallenged. Moreover, Pinholster failed to show prejudice because he had already admitted that he burglarized Kumar's residence on the night of the murders.

6

Pinholster challenges his trial counsel's decision to admit evidence that the police had recovered narcotics during the search of his apartment. He also claims ineffective assistance due to his trial counsel's failure to exclude evidence that

he had thrown a gun from the window of a different apartment while the police executed a search warrant on his apartment. Although his trial counsel challenged the officers' identification of Pinholster, Pinholster admitted during cross-examination that he threw the gun.

The district court concluded that (1) Pinholster failed to show prejudice, as he admitted to using drugs and possessing guns in his testimony; (2) that even without Pinholster's testimony, the narcotics evidence was not prejudicial, as the jury heard from other sources, including Corona, that Pinholster used drugs; and (3) that though trial counsel attempted to challenge the officers' identification of Pinholster as the man who threw the gun, it is reasonable to believe that the jury found the officers' testimony credible. We agree and hold that the district court properly denied Pinholster's request for an evidentiary hearing.

7

Pinholster argues that trial counsel were ineffective for asking prospective jurors questions about white supremacist gangs such as the Aryan Brotherhood. The district court concluded that trial counsel were not deficient because they knew the Corona tape contained references to the Aryan Brotherhood, and they made a tactical decision to forewarn the jurors that the subject might arise. On appeal, Pinholster argues that trial counsel were ineffective for failing to object when the prosecution returned to this theme throughout the guilt phase of the trial.

Pinholster has again failed to make a colorable claim that he was prejudiced by the alleged deficient performance. Given the strong evidence against Pinholster, it is not reasonably probable that trial counsel's failure to exclude all references to Pinholster's connection to white supremacists affected the verdict.

IV

We now turn to the State's appeal. The State contends that the district court improperly found, based on evidence not before the state court, that Pinholster's trial counsel inadequately investigated and deficiently presented mitigating evidence at the penalty phase. We hold that Pinholster properly exhausted his ineffective assistance of counsel claim, and that any error the district court may have committed in holding an evidentiary hearing is harmless because, even with the evidence presented at the hearing, Pinholster has not shown that he was prejudiced by counsel's failure to offer additional mitigating evidence.[20]

[20] The State contends the district court abused its discretion by granting Pinholster a federal evidentiary hearing. The State argues that the district court failed to consider whether Pinholster-given his shifting medical impairment theories and new lay witness declarations-properly developed a factual basis for his claim in state court. *See Baja v. Ducharme*, 187 F.3d 1075, 1078 (9th Cir.1999). The State waived this issue by failing to raise it in its opening brief. *See United States v. Kama*, 394 F.3d 1236, 1238 (9th Cir.2005). Moreover, as we discuss *infra*, any error was harmless.

A

A state prisoner must exhaust all available remedies in state court before a federal court may grant him habeas relief. 28 U.S.C. § 2254(b)(1)(A); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999). A state prisoner must describe the operative facts and federal legal theory on which he grounds his claim so the state court has a " 'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim." *Anderson v. Harless*, 459 U.S. 4, 6, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982) (per curiam) (quoting *Picard v. Connor*, 404 U.S. 270, 276, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971)). Presenting additional facts to the district court does not evade the exhaustion requirement when the prisoner presents the substance of his claim to the state courts. *See Vasquez v. Hillery*, 474 U.S. 254, 257-58, 260, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (rejecting challenge to new evidence because it did not fundamentally alter the legal claim the state courts previously considered).

We review de novo whether Pinholster failed to exhaust California remedies. *See Castillo v. McFadden*, 399 F.3d 993, 998 (9th Cir.2005). The California Supreme Court had a sufficient opportunity to hear Pinholster's claim of ineffective assistance of counsel at the penalty phase. Throughout the habeas proceedings, Pinholster has continued to press the same legal claim (ineffective assistance at the penalty phase) and the same factual basis (e.g., counsel failed to present significant mitigating evidence and, instead, presented harmful, false evidence at the penalty phase). The federal and

state petitions detail many identical facts. Both describe trial counsel's failure to seek a continuance to prepare for the penalty phase; counsel's introduction of Mrs. Brashear's testimony; Pinholster's childhood home life; and Pinholster's background, including his educational, medical, psychological, social, and family history. Pinholster did not, as the State contends, "present vague and conclusory constitutional claims in the state court, phrased with sweeping generality and supported by skimpy factual allegations."

Though during the proceedings Pinholster relied on different experts with differing mental impairment theories, the evolving theories have not significantly changed the evidentiary basis for his arguments. These experts relied on the same background information Pinholster presented to the state court, and their testimonies represent only a fragment of the mitigating evidence submitted in the state habeas proceedings. Accordingly, the facts adduced at the evidentiary hearing have not fundamentally altered the legal claim the California Supreme Court already considered and rejected, and we conclude that Pinholster has exhausted this claim. *See Weaver v. Thompson*, 197 F.3d 359, 364 (9th Cir.1999) (rejecting exhaustion argument as "unwarranted hairsplitting" where at each step the legal claim remained the same, but the precise factual predicate for the claim changed after the evidentiary hearing).

B

Habeas relief is proper if the California Supreme Court's decision was either "contrary to, or

involved an unreasonable application of" *Strickland*.[21] *Williams*, 529 U.S. at 391, 120 S.Ct. 1495 (internal quotation marks omitted). We need not determine whether Pinholster's trial counsel performed deficiently because we find the prejudice inquiry dispositive. *See Strickland*, 466 U.S. at 697, 104 S.Ct. 2052 ("[T]here is *no reason* ... to address both components of the inquiry if the defendant makes an insufficient showing of one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.").

Pinholster bears the "heavy burden" of establishing actual prejudice. *See Williams*, 529 U.S. at 394, 120 S.Ct. 1495 (internal quotation marks omitted). He must demonstrate that there is a reasonable probability the sentencer would have found death unwarranted absent his counsel's errors. *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome. [I]t is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding,

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[21] Because the California Supreme Court summarily denied Pinholster's penalty phase ineffective assistance of counsel claim, we have independently reviewed the record to ascertain whether the state court decision was objectively unreasonable. *See Himes*, 336 F.3d at 853;*Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir.2002). Though unable to analyze the basis for the state court's decision, we still view the decision through the "objectively unreasonable" lens. *See Delgado*, 223 F.3d at 982.

because virtually every act or omission of counsel would meet that test." *Williams*, 529 U.S. at 394, 120 S.Ct. 1495 (quoting *Strickland*, 466 U.S. at 693-94, 104 S.Ct. 2052 (citation omitted)). In *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), the Supreme Court explained that we must reweigh the evidence in aggravation against the totality of available mitigating evidence to assess prejudice. *Id.* at 534, 123 S.Ct. 2527. In so doing, "we evaluate the totality of the evidence-'both that adduced at trial, and the evidence adduced in the habeas proceeding[s].'" *Id.* at 536, 123 S.Ct. 2527 (emphasis omitted) (quoting *Williams*, 529 U.S. at 397-98, 120 S.Ct. 1495).[22]

The dissent relies heavily on the Supreme Court's decisions in *Williams*, *Wiggins*,[23] and *Rompilla*. However, as Justice O'Connor stated in her concurrence in *Rompilla*, we must apply a "case-

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[22] Despite Chief Judge Kozinski's misgivings, *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), does not signal a change in the Supreme Court's approach to analyzing the prejudice prong under *Strickland*.*See* Kozinski Concurrence at 773-74. The Court's decision not to address the aggravating evidence in *Rompilla* more likely resulted from its conclusion that petitioner was clearly prejudiced from his counsel's ineffective assistance, *see*545 U.S. at 390, 125 S.Ct. 2456 ("We think Rompilla has shown beyond any doubt that counsel's lapse was prejudicial; Pennsylvania, indeed, does not even contest the claim of prejudice"), rather than from an express desire to overrule prior precedent.

[23] But even the dissent concedes that the aggravating evidence here is stronger than that in *Wiggins* because Wiggins, unlike Pinholster, did not have a record of violent conduct. *See* Dissent at 786.

by-case approach to determining whether an attorney's performance was unconstitutionally deficient under *Strickland*." *Rompilla*, 545 U.S. at 393-94, 125 S.Ct. 2456 (O'Connor, J., concurring). The Supreme Court has not gone so far as to say that an attorney's failure to uncover a certain class of mitigating evidence automatically results in a showing of prejudice. *See id.* Therefore, we must conduct an independent review of the evidence presented, reweighing what the State produced in the form of aggravating evidence against that which Pinholster produces in mitigation. Like the California Supreme Court, we conclude that the potential mitigating evidence is insufficient to outweigh the overwhelming aggravating evidence. We are heavily influenced by the damage Pinholster did to himself when he took the stand in the guilt phase and testified to an unrepentant life of violent crime.

During the state and federal habeas proceedings, Pinholster submitted evidence to the state court showing that he suffered years of significant neglect and physical and emotional abuse as a child. Pinholster's step-father, Bud Brashear, frequently beat Pinholster with his fists, a belt, or anything else available, including a two-by-four board. Moreover, Pinholster presented evidence during the habeas proceedings that, because he resembled his biological father, he was severely beaten by his grandparents.

Pinholster painted somewhat of a different picture during a July 16, 1991, interview with a defense investigator Sheryl Duvall, who at the time worked as an independent Criminal Justice

Consultant. She was hired by an attorney named Leonard Tauman to prepare a social history on Pinholster. As reflected in her interview notes, Pinholster discussed his social history, including his relationship with various family members.[24] Pinholster rejected his mother's claim that his step-father "abused" him growing up. Although he admitted that his step-father used a homemade paddle freely on him and his brothers, Pinholster claimed that they "benefitted" from the "discipline." Pinholster's primary complaint about his step-father was that "he didn't seem to want the kids around."

Although Pinholster presented evidence of physical abuse from his maternal grandmother, Pinholster claimed that he and his maternal grandfather were very close. He spent summers with his grandparents, working on their chicken farm. He claimed that his "[grandfather] was affectionate with

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[24] The district court refused to consider statements made in Duvall's interview notes on the basis that the notes constituted inadmissible hearsay. However, the parties stipulated to the admission of these interview notes during the evidentiary hearing; Pinholster's habeas counsel made no objection based on hearsay. *See United States v. Foster*, 711 F.2d 871, 877 (9th Cir.1983) (stating that, where there is no objection to hearsay evidence, "such evidence is to be given its natural probative effect as if it were in law admissible" (internal quotation marks omitted)). Furthermore, the Supreme Court has instructed us to "'evaluate the totality of the evidence-both that adduced at trial, *and the evidence adduced in the habeas proceeding[s].*'" *Wiggins*, 539 U.S. at 536, 123 S.Ct. 2527 (quoting *Williams*, 529 U.S. at 397-98, 120 S.Ct. 1495).

the boys. He made them work hard on the farm but he was quick to praise their efforts." Pinholster's grandfather made him feel good about himself. When Duvall asked Pinholster whether he believed his life would have been different had his grandfather lived, Pinholster responded "definitely." He claimed that, after his first arrest, he would have been sent to live with his grandparents. These sentiments were supported in a medical report developed upon Pinholster's release from the Camarillo State Hospital in 1971 when Pinholster was eleven-years-old. Pinholster was reported as being "very close" to his maternal grandfather, with his grandfather's death being an "emotional shock."

During the interview with Duvall in 1991, Pinholster also described his relationship with his mother, Mrs. Brashear. He claimed that he always "felt very close to his mother," and he had nothing but praise for her. He stated that "[s]he's always been supportive of all the kids. She's always the first there and last to leave. She always had a hot dinner on the table." At the time of the interview, Pinholster remained in close contact with his mother.[25]

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[25] The dissent questions our consideration of Pinholster's description of his social history. *See* Dissent at 781-82. We are not crediting Pinholster's description of the events over that of other family members. We recognize that Pinholster was likely beaten and abused by both his step-father and maternal grandmother. While we in no way condone such treatment of any child, our role in these inquiries is to try and assess the extent of the mitigating evidence as it relates to the potential prejudice to Pinholster. In doing so, Pinholster's own perception of his childhood and its affect on him is certainly relevant. We also find relevant the fact that

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In addition, the jury did hear some mitigating evidence from Pinholster's mother during her penalty phase testimony. We recognize that Mrs. Brashear inaccurately portrayed herself as a dedicated, caring mother, and, indeed, she failed to present Pinholster's troubled childhood and mental and emotional problems in the most compelling manner. Nonetheless, the jury heard mitigating facts from her testimony. Mrs. Brashear described Pinholster's strained relationship with his step father, conceding that Bud Brashear's attempts to discipline Pinholster sometimes rose to the level of abuse.

On cross-examination, she admitted that her daughter, Tammy Brashear, was currently on probation, and that her other son, Alvin Pinholster, died after attempting to evade the authorities. Mrs. Brashear recounted an accident when she ran over Pinholster (who was a toddler) with her car, nearly tearing off one of Pinholster's ears and causing a shoulder injury that required just over a week in the hospital. She also discussed Pinholster's second head injury resulting from another car accident; a psychologist's recommendation to commit Pinholster to a mental hospital at age ten; his time in a class for emotionally handicapped children; and his epilepsy, which she believed resulted from a severe beating at age eighteen in county jail. The penalty phase verdict reflects the jury's obvious rejection of such mitigating circumstances in light of all that Pinholster had said and done as a recidivist and the brutality of these robbery/murders.

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Pinholster's paternal grandfather provided some stability during Pinholster's early childhood.

It is unlikely Pinholster's evidence of mental impairment would have had a significant impact on the jury. As a toddler, Pinholster was in two separate car accidents that allegedly resulted in head injuries, and throughout his childhood and early adolescence, Pinholster displayed symptoms of and received treatment for epilepsy. Nevertheless, the experts' opinions about Pinholster's psychological impairments and whether these impairments resulted from a head injury have varied considerably, becoming somewhat of a moving target for the California Supreme Court and federal courts on habeas review.

The California Supreme Court has denied two habeas petitions, one in which Pinholster relied on Dr. Woods as his expert, and another in which he relied on Dr. Stalberg as his expert. Dr. Woods opined that, during the murders, Pinholster was substantially impaired by a bipolar mood disorder operating synergistically with a seizure disorder. Declining to present Dr. Woods's diagnosis,[26]

[26] None of the other experts agreed with Dr. Woods's diagnosis of bipolar mood disorder. In his June 2001 declaration, Dr. Stalberg stated that Pinholster "was substantially impaired by a bipolar mood disorder operating synergistically with intoxication and a seizure disorder at the time the crime was committed." However, during the evidentiary hearing, Dr. Stalberg rejected that statement as his own testimony. He stated, "I never said that and never testified to [Pinholster having bipolar mood disorder]." Subsequently, in August 2002, Dr. Stalberg filed another declaration in which he stated simply that Dr. Woods's diagnosis of bipolar mood disorder was "incorrect." Dr. David Rudnick, a neuropsychiatrist who served as an

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Pinholster rehired Dr. Stalberg as his expert for the second state habeas petition. Dr. Stalberg stated that he had reviewed the materials presented by Pinholster's habeas counsel and that, had he known of "Pinholster's family history of severe psychiatric disorders, his disturbed behavior during childhood, and his irrational and highly aggressive actions immediately before the homicides," he would have "ma[de] further inquiry before concluding that [Pinholster] had merely a personality disorder." He further stated that "[t]he new material" would have "materially modified [his] opinion regarding mitigating circumstances." After the California Supreme Court again denied Pinholster's habeas petition, he appeared ready to proceed to federal court with Dr. Stalberg as his expert.

On June 5, 2001, Dr. Stalberg executed a more detailed declaration in which he stated that the penalty phase testimony of Mrs. Brashear was "profoundly misleading" as she failed to truthfully describe Pinholster's early childhood, which "was marked by significant deprivation, physical abuse, and extreme neglect." Dr. Stalberg again acknowledged that Pinholster likely suffers from a seizure disorder, and went on to opine that some of the violent incidents in Pinholster's past-the breaking of his wife's jaw and his assault on Officer

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expert for the State during the federal evidentiary hearing, stated in his declaration of July 11, 2001, that "[t]here is no evidence for the diagnosis of bipolar disorder at any time in Mr. Pinholster's life." Similarly, Dr. Vinogradov stated that she found "no clear information supporting true full-blown hypomanic or depressive episodes."

Kaufman-could have been attributed to his seizure disorder.

After Dr. Stalberg refused, despite all of the new mitigating evidence, to alter his diagnosis of Antisocial Personality Disorder, Pinholster's habeas counsel informed him that he would no longer be serving as their expert. Instead, in support of his amended federal habeas petition, Pinholster choose to rely on the new expert testimony of Dr. Vinogradov and Dr. Olson. Dr. Olson concluded that "it is reasonably probable that Mr. Pinholster has suffered from partial epilepsy since at least 1968." In support of his conclusion, Dr. Olson relied on the two head injuries Pinholster suffered as a child, Pinholster's abnormal EEG at age nine,[27] the descriptions of Pinholster's seizures provided by other witnesses, and Pinholster's treatment for seizures with standard anti-seizure medication.

Dr. Vinogradov relied on the same evidence as the other experts and conducted two face-to-face interviews with Pinholster. She implicitly rejected Dr. Woods's diagnosis, stating there was "no clear information supporting true full-blown hypomanic or depressive episodes." However, she diagnosed Pinholster with "personality change, aggressive type, due to serious childhood head trauma." She opined that, "[o]n the night of the crimes, while intoxicated

[27] Dr. Rudnick testified that Pinholster's abnormal EEG in 1968 could have been caused by his Attention Deficient Hyperactivity Disorder, or by the fact that he was only nine-years-old at the time. As Dr. Rudnick described, maturation of the brain is "characterized by a reduction in slow wave activity of the same frequencies observed" in Pinholster.

on multiple substances, Mr. Pinholster experienced perceptual aberrations and possible psychotic symptoms."

The dissent believes that Pinholster has presented evidence of "substantial neurological and emotional disorders." Dissent at 782. However, the only constant with regard to the evolving defense expert testimony has been Dr. Stalberg's diagnosis of Antisocial Personality Disorder and the experts' agreement that it is reasonably probable that Pinholster suffered from epilepsy.[28] The California Supreme Court has faced a revolving door of experts, each presenting his or her own theory on Pinholster's mental health. Although we have no pronounced

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[28] Dr. Rudnick agreed with Dr. Stalberg's diagnosis and also noted in his declaration that John Geiger, M.D., a staff psychiatrist at San Quentin State Prison, diagnosed Pinholster with Antisocial Personality Disorder and concluded that his violent behavior was "approximately that of the average condemned area inmate." Charles E. Steinke, Ph.D., a staff psychologist at San Quentin, also agreed with Dr. Geiger's diagnosis of Anti-social Personality Disorder. We have previously noted that a diagnosis of Antisocial Personality Disorder is "potentially more harmful to [a] petitioner than [helpful]." *Gerlaugh v. Stewart*, 129 F.3d 1027, 1035 (9th Cir.1997); *see also Daniels v. Woodford*, 428 F.3d 1181, 1204-05 (9th Cir.2005) (concluding that the jury "never heard any mitigating psychological explanation for Daniels's behavior" because trial counsel relied solely on testimony suggesting that Daniel was a "sociopath"); *Clabourne v. Lewis*, 64 F.3d 1373, 1384 (9th Cir.1995) (stating that omitted mental health records were "hardly ... helpful" as they indicated that the defendant had "an antisocial personality").

reason to question the credibility of Pinholster's new experts, we conclude that no newly-minted expert theory to explain his behavior would have made a difference in the face of what Pinholster said and did.

Though the Supreme Court has recently highlighted defense counsel's constitutional duty to adequately investigate mitigating evidence, we cannot say from the record either before the state or federal district court that it was objectively unreasonable for the California Supreme Court to deny relief. While trial counsel could have presented more detailed mitigating evidence-in the form of Pinholster's social history and mental health history-that evidence falls short when compared to the mitigating evidence available in *Williams*, *Wiggins*, and *Rompilla*, and the overwhelming evidence in aggravation which Pinholster faced.

In *Williams*, had counsel performed effectively the jury would have learned that Williams's parents were imprisoned for criminal neglect; Williams's father repeatedly beat him; Williams was borderline mentally retarded and had not advanced beyond sixth grade; and, while in prison, Williams helped crack a prison drug ring, he returned a prison guard's missing wallet, and prison officials testified that he was the least likely to act violently out of all the inmates. 529 U.S. at 395-96, 120 S.Ct. 1495. As the Supreme Court emphasized, this mitigating evidence coupled with the evidence the jury did hear-that "Williams turned himself in, alerting police to a crime they otherwise would never have discovered, express[ed] remorse for his actions, and cooperat[ed] with the police after that"-could have influenced the jury's view of Williams's moral culpability. *Id.* at 398,

120 S.Ct. 1495. In *Williams,* the additional mitigating evidence tended to show that Williams's "violent behavior was a compulsive reaction rather than a product of coldblooded premeditation." *Id.* Pinholster, on the other hand, presented himself to the jury as a classic antisocial personality who revels in his disobedience to the law and social mores.

In *Wiggins,* defense counsel failed to present evidence that Wiggins's mother was an alcoholic and abusive to Wiggins and his siblings, Wiggins entered foster care at age six, two foster mothers physically abused him, his second foster father repeatedly raped and molested him, he spent time homeless, and he was mentally retarded. 539 U.S. at 525, 535, 545, 123 S.Ct. 2527. In finding that Wiggins was prejudiced by his counsel's ineffective assistance at the penalty phase, the Supreme Court compared Wiggins to Williams, noting that "Wiggins does not have a record of violent conduct that could have been introduced by the State to offset this powerful mitigating narrative." *Id.* at 537, 123 S.Ct. 2527. Pinholster, in contrast, is the epitome of a repeat offender who specializes in violent crimes.

In *Rompilla,* had defense counsel conducted a sufficient investigation into mitigating evidence, the jury would have learned that Rompilla's parents suffered from severe alcoholism; Rompilla's mother drank during her pregnancy, causing Rompilla to develop fetal alcohol syndrom; Rompilla and his brothers also developed serious drinking problems; Rompilla's father severely beat both Rompilla and his mother; Rompilla's mother and father fought violently, with one incident resulting in his mother stabbing his father; and that Rompilla suffered a

depraved childhood, during which he was locked in a mesh dog pen, isolated from other children, and slept in an attic with no heat. 545 U.S. at 391-92, 125 S.Ct. 2456. In addition, counsel would have found evidence suggesting that Rompilla suffered from schizophrenia and other mental disorders.

In contrast to the petitioner in *Wiggins*, who had no prior convictions nor a record of violent conduct, *cf. Wiggins*, 539 U.S. at 537, 123 S.Ct. 2527, Pinholster's violent past-a past Pinholster proudly boasted about to the jury-offsets the mitigating evidence. Pinholster bragged that he had committed hundreds of armed robberies within a three-year time period. In addition, he admitted to a prior kidnaping, during which he held a knife to the victim's throat. And, unlike the petitioner in *Williams*, Pinholster neither expressed remorse over the murders of Thomas Johnson and Robert Beckett, nor attempted to aid the police in their investigation. Rather, Pinholster threatened to kill the State's lead witness, Art Corona, and proudly recounted his recusant behavior in front of the jury.[29]

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[29] During the penalty phase, the jury also heard evidence regarding the numerous threats and assaults Pinholster inflicted on law enforcement, as well as several disciplinary infractions while he was arrested and incarcerated. For example, LAPD officers Kaufman and Guzman testified that Pinholster kicked or attempted to kick them in the head while they tried to restrain him on different occasions. Los Angeles County Central Jail Operations Sergeant Thomas Piggott testified to some of the eleven disciplinary incidents with Pinholster involving "overt violence or some challenge to future recalcitrant type behavior." Finally, the State presented the testimony of Cathy

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We recognize that, at first glance, Pinholster's habeas petition more closely resembles that of the petitioner in *Rompilla*. Nevertheless, there are significant differences, and we must analyze an attorney's alleged ineffective assistance of counsel on a case-by-case approach. *See Rompilla*, 545 U.S. at 393-94, 396, 125 S.Ct. 2456 (O'Connor, J., concurring). California law provides that, in determining the penalty, the jury shall consider, if relevant, "[t]he circumstances of the crime of which

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Ann Smith. She testified that Pinholster broke her jaw while seemingly having an epileptic seizure. However, because trial counsel could have rebutted some of this aggravating evidence, we do not give it substantial weight in the reweighing of the aggravating and mitigating factors. For example, former Los Angeles County Deputy Sheriff Dale Peroutka would have testified that Pinholster "eventually [ ] turned himself around" such that Peroutka and other deputies recommended to reclassify Pinholster from administrative segregation to the general population. Peroutka no longer saw Pinholster as a danger to other deputies or inmates; he reached an agreement with Pinholster that he could join the general population if he behaved and complied with the rules. Likewise, trial counsel could have diminished the impact of a serious disciplinary infraction admitted by stipulation. Allan Page Crowder, the corrections officer Pinholster allegedly threatened to throw off a tier in state prison, would have testified that had he been a more seasoned officer, he would not have considered the 1978 verbal altercation worthy of a CDC 115 disciplinary report. Nevertheless, because we find other more substantial aggravating evidence in the record, this newfound mitigating evidence does not change our ultimate conclusion that no reasonable juror would have been persuaded to change his vote.

the defendant was convicted in the present proceeding and the existence of any special circumstances." Cal.Penal Code § 190.3(a). Indeed, the trial court instructed the jury that "[i]n determining which penalty is to be imposed on the Defendant, you shall consider all of the evidence which has been received during any part of the trial of this case." Here, the jury witnessed first-hand Pinholster's lack of remorse. *Cf. Schriro v. Landrigan*, 550 U.S. 465, 127 S.Ct. 1933, 1944, 167 L.Ed.2d 836 (2007) (noting that the "postconviction court was well acquainted with Landrigan's exceedingly violent past and had seen first hand his belligerent behavior"); *see also id.* ("In his comments [to the sentencing judge], defendant not only failed to show remorse or offer mitigating evidence, but he flaunted his menancing behavior." (internal quotation marks and first alteration omitted)). Justice Mosk specifically emphasized that point in authoring the decision for the California Supreme Court: "[Pinholster] himself made his criminal disposition clear [to the jury.] In fact, he gloried in it." *Pinholster*, 4 Cal.Rptr.2d 765, 824 P.2d at 611.

Pinholster viciously beat the two murder victims, repeatedly stabbed them with a knife, and took their wallets for a gain of $23 and a quarter-ounce of marijuana.[30] Yet, under oath, Pinholster

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[30] The dissent questions the heinousness of these murders, comparing this factual scenario with those found in *Belmontes v. Brown*, 414 F.3d 1094 (9th Cir.2005), *rev'd on other grounds, Ayers v. Belmontes*, 549 U.S. 7, 127 S.Ct. 469, 166 L.Ed.2d 334 (2006); *Hovey v. Ayers*, 458 F.3d 892 (9th Cir.2006); and *Fields v. Brown*, 431 F.3d 1186 (9th Cir.2005). Dissent at 4797-99. However, for the jury

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denied murdering the victims and bragged about the successful hundred-plus robberies he had previously committed. Pinholster called himself a "professional robber," and testified that he often wrote his name and scratched swastikas on other people's property as a "sideline to robbery."[31] Moreover, the jury heard evidence that Pinholster was previously convicted for

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charged with the duty of weighing the mitigating and aggravating factors in determining whether this defendant should receive a life sentence or suffer death, these separate, unconnected murders are irrelevant. Unlike a trial judge who may try several murder cases, or an appellate court that may review several different murder convictions in those states imposing a proportionality review on appeal in capital cases, this is likely the first and only time these jury members will become so intimate with facts involving the taking of human lives. The jury does not compare one murder to another, ranking the heinousness of the individual crimes on some imaginary scale. California does not require a proportionality review as do some other states in death penalty cases. Rather, as the Supreme Court has directed appellate courts to do, juries also consider the underlying facts of a death penalty case on an individualized case-by-case basis in weighing the aggravating and mitigating facts. Cal.Penal Code § 190.3. We do not share our colleague's view that this was not a particularly heinous double homicide.

[31] Dr. Rudnick stated that "[Pinholster's] behavior at Lisa Tapar's house was a clear, angry reaction to having the door closed on him. After stabbing the door, he performed the very deliberate, aggressive act of carving various Nazi symbols on Lisa's car." This analysis, along with Pinholster's ability to give a detailed description of his actions during this event, would not have been forgotten by the jury considering any of the newly proffered mitigating evidence.

kidnaping, that he threatened to kill the State's lead witness, and that, in a jealous rage, Pinholster slashed the arm of Thomas Mesquita with a straight razor.

Pinholster's detailed account of his version of the events on the night of the murders would obviously affect the jury's view of Pinholster's mental impairment evidence. And, the jury also observed firsthand on the witness stand an individual who failed to respect the gravitas of the multiple murder trial through his unrepentant attitude. In addition to taking pride in his criminal background, Pinholster was openly disrespectful of the deputy prosecutor and ignored the seriousness of his underlying murders. The record reflects that Pinholster was either laughing or smirking during numerous stages of the deputy prosecutor's cross-examination.

We cannot ignore the fact that, even while hearing Pinholster's defense in the guilt phase of the trial, the jury was considering facts that were also relevant to appropriate punishment. *See* Cal.Penal Code § 190.3(a). In his testimony, Pinholster portrayed himself as a career criminal who reveled in his antisocial persona. As Dr. Rudnick explained in his declaration, "individuals with Antisocial Personality Disorder may have an inflated and arrogant self-appraisal, behave in a cocky or self-assured manner, lack realistic concern about their problems and display a glib, superficial charm."[32] The

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[32] As detailed above, Dr. Woods used Pinholster's behavior at trial to support his diagnosis of bipolar mood disorder. Given that Pinholster chose not to rely on Dr. Woods's diagnosis in his federal

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California Supreme Court, which acknowledged the fact that Pinholster "gloried" in his criminal history, could reasonably have concluded that no amount of clever "after-the-fact" assessment by habeas defense psychiatrists would have convinced even a single juror to change his vote.

V

We affirm the district court's denial of Pinholster's request for an evidentiary hearing on ineffective assistance of counsel at the guilt phase and remand for dismissal of the petition. We reverse the district court's grant of habeas relief on his ineffective assistance of counsel claim at the penalty phase.

AFFIRMED in part, REVERSED in part, VACATED, and REMANDED.

KOZINSKI, Chief Judge, concurring:

I join Judge Tallman's opinion in full, but I do have one misgiving: I'm not sure whether *Rompilla v. Beard*, 545 U.S. 374, 393, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), still allows us to "reweigh the evidence in aggravation against the totality of available mitigating evidence," *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), when counsel fails to uncover mitigating evidence. After all, counsel failed to uncover

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habeas petition, and that both Dr. Stalberg and Dr. Rudnick discredit this diagnosis, we cannot believe the jury would have given it much weight.

mitigating evidence in *Rompilla*, and the Supreme Court didn't seem to address the aggravating evidence in assessing prejudice. *See Rompilla*, 545 U.S. at 393, 125 S.Ct. 2456. Still, I have a hard time believing that *Rompilla* overruled a recent case like *Wiggins* without bothering to say so. *See id.* (quoting *Wiggins*, 539 U.S. at 538, 123 S.Ct. 2527).

Rompilla devotes most of its analysis to describing counsel's deficiencies, not to assessing the prejudice to petitioner. The Court found that counsel were ineffective in *Rompilla* because they failed to adequately prepare for a penalty phase hearing where the prosecution focused on petitioner's prior conviction, *not* because they failed to look for evidence of childhood abuse. *See Rompilla*, 545 U.S. at 394-96, 125 S.Ct. 2456 (O'Connor, J., concurring). As Justice O'Connor's linchpin concurrence made clear, counsel's "trial-preparation" there was deficient because they failed to obtain petitioner's prior conviction file in anticipation of a hearing where the prosecution would focus on that conviction. *Id.* at 395, 125 S.Ct. 2456. Had defense counsel properly prepared for the hearing by obtaining that file, they would have stumbled across a cache of valuable evidence of childhood abuse and mental defect. *Id.* at 390-91, 125 S.Ct. 2456 (majority opinion). I read *Rompilla* for the unremarkable proposition that counsel must take the steps a reasonable lawyer would take in preparing for a hearing, not that counsel are always ineffective for failing to uncover childhood mitigating evidence.

I would therefore find (as an alternative ground for reversal) that petitioner's counsel weren't deficient, because they made a rational decision to

pursue what was essentially a "pity" mitigation case, rather than try to make out a case of mental defect. Counsel faced a difficult situation: During the guilt phase, petitioner portrayed himself as a career criminal and boasted that he had committed hundreds of robberies using a gun. And petitioner admitted to breaking into Kumar's house on the night of the murders. The jury had ample opportunity to evaluate petitioner's demeanor. Counsel may well have felt that petitioner's articulate and coherent testimony portrayed him as a clever liar, not as someone who is mentally deficient. This conclusion would have been bolstered by Dr. Stalberg, who evaluated petitioner's mental state and found him essentially normal. While Dr. Stalberg has since flipped a couple of times in his conclusions, petitioner doesn't rely on him now, so we can't say that Dr. Stalberg would ultimately have come up with a helpful diagnosis, had petitioner's lawyers only given him more facts. Petitioner's new lawyers did eventually manage to find psychiatrists willing to say he is mentally impaired, but trial counsel had no reason to believe that they could swiftly find another doctor who would disagree with their own expert's diagnosis.

Under these circumstances, it was reasonable for them to eschew a mental defect defense and pursue another mitigation strategy. Ultimately, they focused on petitioner's mother, who testified about his head injuries, his disruptive behavior in school, a psychologist's recommendation that she commit him to a mental hospital, his frequent stays at juvenile hall and his epilepsy. The dissent chastises trial counsel for making "no investigation into Pinholster's background at all," dissent at 779, but I don't see why

talking to a defendant's mother doesn't count as an investigation into his background. The investigation may not have been as thorough as our dissenting colleague would have preferred, but surely it's wrong to say that defense counsel conducted no investigation at all.

Petitioner's mother was not the perfect mitigation witness, but it's not clear that petitioner *had* a perfect mitigation witness. Nor is perfection the standard; the question is whether, applying the broad deference due to counsel under *Strickland v. Washington*, 466 U.S. 668, 690-91, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and the even broader deference due to the California Supreme Court under AEDPA, 28 U.S.C. § 2254(d), we can say that counsel's decision is wholly unreasonable. This was not a case like *Rompilla* or *Williams v. Taylor*, 529 U.S. 362, 395, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), where review of a single file would have yielded a treasure trove of mitigating evidence; finding all the evidence that petitioner's current lawyers have amassed after years of effort and expert-shopping was simply beyond the time and resources available to counsel at the time of trial.

Justice O'Connor's concurrence in *Rompilla* reaffirmed the "longstanding case-by-case approach to determining whether an attorney's performance was unconstitutionally deficient." *Rompilla*, 545 U.S. at 394, 125 S.Ct. 2456 (O'Connor, J., concurring). *Rompilla* involved a particular hearing regarding petitioner's prior conviction, and because counsel failed to adequately prepare for that hearing by obtaining petitioner's prior conviction file, counsel were unable to adequately rebut the prior conviction

evidence. *See id.* at 394-96, 125 S.Ct. 2456. This was a discrete, precisely identifiable strategy-"a sure bet," *id.* at 389, 125 S.Ct. 2456 (majority opinion)-that no competent counsel could overlook or bypass. It is quite different from counsel's debatable judgment call here as to how best to present their mitigation case-after petitioner portrayed himself as a career criminal at the guilt phase and their mental expert found no basis for mitigation. Under a "case-by-case approach," *id.* at 394, 125 S.Ct. 2456 (O'Connor, J., concurring), I can't say that counsel's decision to focus solely on petitioner's mother was unreasonable in these difficult circumstances. Nor was the state court unreasonable in finding that petitioner's constitutional rights were not violated.

FISHER, Circuit Judge, dissenting:

I respectfully dissent. This case is controlled by a trio of recent Supreme Court decisions holding that petitioners' Sixth Amendment rights were violated when their lawyers failed to present available mitigating evidence during the penalty phases of their capital trials. *See Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The majority's attempts to distinguish these cases are not persuasive. Pinholster's counsel performed at least as deficiently as the lawyers in the Court's recent decisions; and Pinholster was prejudiced as a result since the mitigating evidence that could have been introduced on his behalf was at least as strong as that in *Williams*, *Wiggins* and *Rompilla*, and the aggravating evidence against him was if anything

weaker than that in *Williams* and *Rompilla*. Binding Supreme Court precedent therefore compels the conclusion that the state court's summary denial of Pinholster's penalty phase ineffective assistance of counsel (IAC) claim was objectively unreasonable. I would therefore remand for the district court to issue a writ vacating Pinholster's sentence, unless within a reasonable time set by the court the State conducts a new penalty phase trial or imposes a lesser sentence consistent with law.

I.

Before addressing the majority's penalty phase analysis, I pause to note my partial disagreement with its resolution of Pinholster's guilt phase IAC claim. I agree that the district court did not err in denying Pinholster's request for an evidentiary hearing on that claim, but I would base that conclusion solely on Pinholster's failure to present a colorable claim of prejudice. I cannot agree with the majority's conclusion that counsel's decision to advise Pinholster to testify was a reasonable tactical choice rather than deficient performance.[1]

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[1] I also disagree with the majority's conclusion that the California Supreme Court reasonably concluded that Pinholster's counsel was effective in failing to object to highly prejudicial evidence suggesting that Pinholster murdered two other individuals in Sun Valley. That court's conclusion was based entirely on the assumption that the evidence would assist Pinholster's defense. However, Pinholster's defense was irrational and should have never been put forth. The California Supreme Court

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Pinholster's counsel advised him to testify to a defense that was not only implausible and nonsensical, but also demonstrably false. There was compelling evidence disproving almost every facet of the defense's case. First, contrary to Pinholster's claim that he was a gun-toting robber and not a knife-wielding burglar, several witnesses testified at trial that they saw Pinholster carrying a large buck knife immediately before and after the murders. Pinholster himself admitted to carrying a knife on the night of the murders, and a knife sheath was found in his pocket when he was arrested. Pinholster also testified, contrary to his claim that he was not a burglar, that he had burglarized Kumar's home just hours before the murders took place. In contrast, Corona testified that he and Pinholster went to Kumar's house on the night of the murders intending to rob Kumar, and that the intended robbery turned into a burglary only when they found Kumar's home unoccupied. Corona-the State's lead witness-thus gave testimony that was more consistent with Pinholster's defense than even Pinholster's own

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also failed to consider whether Pinholster could have received the same benefit in terms of "candor," *People v. Pinholster*, 1 Cal.4th 865, 4 Cal.Rptr.2d 765, 824 P.2d 571, 604 (1992), by requesting redaction of the prior murder evidence from the Corona tape and allowing the remainder to be played. Finally, as the prosecution never produced evidence that two Latino men were killed in a shootout in Sun Valley, it appears that Corona's prior murder comments were simply untrue.

testimony. The second part of Pinholster's alibi-that he was at Kumar's residence before and not after his visit to Tapar's house-was also disproved at trial. Contrary to Pinholster's statement that he went to Tapar's residence by himself in order to tell her about Shotgun's death, Tapar testified that she did not know Shotgun and that Pinholster arrived in Corona's car and appeared intent on robbing Kumar. Even more damaging was Klemetti's testimony that he was at Kumar's house at 9 p.m. and found no signs of the burglary that Pinholster claimed to have committed at 8 p.m.

On its own, counsel's chosen defense was misguided. But in light of counsel's additional failure to investigate important physical evidence, including the palm print and the boot print, it amounted to deficient performance.[2] Although a defendant's right

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[2] The majority suggests that Pinholster suffered less prejudice from his counsels' failure to investigate the palm print, because counsel "merely stated that he *probably* " would have advised Pinholster not to testify had he known of evidence that the palm print found at the crime scene did not match Pinholster's palm. *See* Maj. Op. at 759 & n. 13. The question is not what Pinholster's ineffective counsel would have done but rather what effective counsel would have done. Competent counsel would have *certainly* advised Pinholster not to testify. Nor do I agree that the existence of only a "battle of the experts" with regard to the palm print evidence somehow reduces the prejudice from counsel's failure to investigate. *See id.* at 759-60. Evidence that creates a "battle of the experts" is precisely the type

(continued...)

to testify is his own and may not be overridden by counsel, counsel nonetheless has the responsibility to independently investigate and challenge a defendant's implausible story. *See Phillips v. Woodford*, 267 F.3d 966, 978-79 (9th Cir.2001) (stating that an attorney has an obligation to investigate defendant's " 'incredibly lame'" alibi and "'confront the petitioner with the difficulties of his story'") (quoting *Johnson v. Baldwin*, 114 F.3d 835, 838, 840 (9th Cir.1997)). Here, an investigation would have revealed that Pinholster's alibi was highly suspect, giving rise to counsel's obligation to advise Pinholster against testifying, because the jury would likely conclude he was lying.[3] *See also id.* at 979 ("'The prejudice from failing to investigate the alibi and confer more fully with petitioner is not avoided by the fact the petitioner misinformed his

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(...continued)
of evidence that gives rise to reasonable doubt, and thus will typically support a finding of prejudice. In this case it is only because *other* evidence overwhelmingly shows Pinholster's guilt that the new palm print evidence does not amount to prejudice.

[3] The majority's insistence that Pinholster's counsel were not ineffective because Pinholster was "eager to take the stand" is not illuminating. Maj. Op. at 759. Counsels' deficient failure to investigate Pinholster's alibi defense, which in turn rendered them unable to provide competent advice about whether he should testify, made it impossible for Pinholster to make an informed decision as to whether he should exercise his constitutional right to do so.

attorney.'") (quoting *Johnson*, 114 F.3d at 840). At the very least, counsel's shortcoming in this regard makes out a colorable claim of deficient performance for purposes of obtaining an evidentiary hearing. *See id.* (noting that the "colorable claim" standard is "far less onerous" than the standard for granting the writ); *see also Earp v. Ornoski*, 431 F.3d 1158, 1170 (9th Cir.2005) (describing the "colorable claim" standard as "a low bar").

Nonetheless, I agree that Pinholster has failed to present a colorable claim of prejudice. There was overwhelming evidence of Pinholster's guilt, including: Art Corona's eyewitness testimony of the murders; Casey Corona's testimony that she saw Pinholster washing blood off his knife soon after the murders while stating "[i]t had to be done the way it was done"; Kempf's testimony that Pinholster stated-while clutching his buck knife-that he wanted to rob Kumar "one way or the other"; Tapar's testimony that Pinholster appeared at her door with a knife just before the murders and that she had the impression that Pinholster intended to steal from Kumar; and evidence that one Gian Norelli had heard Pinholster brag about stabbing two people in Tarzana, where Kumar lived. In light of this evidence, it is difficult to conceive of any reasonable juror not voting to convict absent a convincing defense theory. Pinholster has failed to articulate such a defense theory. *Cf. Phillips*, 267 F.3d at 980-81 (gauging whether there was a colorable claim of prejudice by comparing the deficient defense presented at trial to a proposed alternative defense). For this reason alone, I would hold that the district court appropriately denied Pinholster an evidentiary hearing on guilt phase ineffective assistance and, necessarily, that the

district court properly denied habeas relief with regard to guilt.

Notwithstanding that counsel's deficiencies were not prejudicial at the guilt phase, I would hold that they added considerably to the prejudice Pinholster suffered at the penalty phase. Counsel's deficient performance at the guilt phase resulted in the jury hearing Pinholster boast about committing hundreds of robberies as well as other damaging evidence suggesting that Pinholster murdered two men. The majority itself makes evident that counsel's failure to advise Pinholster against taking the stand during the guilt phase was prejudicial at the penalty phase, because it repeatedly invokes the "damage Pinholster did to himself when he took the stand in the guilt phase and testified to an unrepentant life of violent crime." *See* Maj. Op. at 767; *see also id.* at 770 ("[N]o newly-minted expert theory to explain his behavior would have made a difference in the face of what Pinholster said and did."); *id.* at 771 (noting that any mitigating evidence would have been offset when Pinholster "proudly boasted to the jury" about his life of crime). The same jury that decided Pinholster's guilt went on to decide his penalty, so the harmful guilt phase evidence undoubtedly added to the other prejudicial errors Pinholster's counsel committed at the penalty phase, to which I now turn.

II.

The majority holds that the California Supreme Court's summary denial of Pinholster's penalty phase IAC claim was not objectively unreasonable. I disagree. In my view, the Supreme Court's recent decisions in *Williams*, *Wiggins* and

Rompilla compel the conclusion that Pinholster's counsel performed deficiently and that Pinholster was prejudiced as a result. The state court's ruling to the contrary was indeed an "unreasonable application of [ ] clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

A.

The majority proceeds straight to the prejudice prong of the IAC inquiry and does not contend that Pinholster's trial counsel performed competently. *See* Maj. Op. at 765-66. This is a wise decision, because counsel manifestly failed to satisfy the professional standards for penalty phase representation. The Supreme Court has held that "trial counsel [must] conduct a thorough investigation of the defendant's background." *Williams*, 529 U.S. at 396, 120 S.Ct. 1495 (citing the applicable American Bar Association standards); *see also Rompilla*, 545 U.S. at 387 & n. 7, 125 S.Ct. 2456;*Wiggins*, 539 U.S. at 524, 123 S.Ct. 2527 ("[I]nvestigations into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence ....") (internal quotation marks omitted). Employing this approach, the Court found deficient performance-despite AEDPA's deferential standard of review-in *Williams*, *Wiggins*, and *Rompilla*. In *Williams*, counsel began to prepare for the penalty phase less than a week before trial, presented only four witnesses and "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood." 529 U.S. at 369, 395, 120 S.Ct. 1495. In *Wiggins*, counsel presented no evidence of the petitioner's life history or family

background, and failed to consult documentary evidence beyond the petitioner's presentence investigation (PSI) report and Department of Social Services (DSS) records. *See*539 U.S. at 516, 524-29, 123 S.Ct. 2527. And in *Rompilla*, counsel presented five witnesses during the penalty phase and reviewed the reports of three mental health experts, but failed to examine the petitioner's prior conviction file even though the prosecution had declared its intention to introduce that file's contents at trial. *See*545 U.S. at 381-86, 125 S.Ct. 2456.

Pinholster's attorneys plainly performed even more deficiently than the lawyers in *Williams*, *Wiggins* and *Rompilla*. According to billing records, they spent only 6.5 hours preparing for the penalty phase of Pinholster's trial. One week before the penalty phase began, counsel admitted that they "had not prepared any evidence by way of mitigation," and then declined to request a continuance so that they could conduct a proper investigation, telling the court that they did not think more time "would make a great deal of difference." They obtained no medical or psychological records, law enforcement records or school reports for Pinholster or his siblings, even though all of this documentary evidence was readily available. They failed to provide the psychiatrist they retained, Dr. Stalberg, with any of the materials he needed to evaluate Pinholster properly. They interviewed and presented just one witness, Pinholster's mother, whose testimony at trial was highly misleading and self-serving. They waived their opening statement in the penalty phase. If the lawyers in *Williams* and *Rompilla* performed deficiently even though they interviewed and

presented multiple witnesses, and if counsel's performance in *Wiggins* was deficient despite the examination of the petitioner's PSI report and DSS records, then Pinholster's attorneys cannot have satisfied the professional standards for penalty phase representation. It is not reasonable for a lawyer to interview and present just one witness, to fail to uncover abundant readily available mitigating evidence and to spend less than a day preparing for a proceeding at which the jury will decide whether the lawyer's client should live or die.

Chief Judge Kozinski, concurring, suggests that this performance was not deficient because counsel "made a rational decision to pursue what was essentially a 'pity' mitigation case, rather than trying to make out a case of mental defect." Concurring Op. at 774. Relying almost exclusively on Justice O'Connor's nonbinding concurrence in *Rompilla*, he argues that *Rompilla* stands only for the "unremarkable proposition" that counsel must take reasonable steps to prepare for a hearing, not "that counsel are always ineffective for failing to uncover childhood mitigating evidence." *Id.* Even if he were correct that *Rompilla*'s holding is so limited, however, the same cannot be said for *Williams*, where the Court noted that it was "*barely disputed*" that counsel were ineffective where, as here, they "did not begin to prepare for [the penalty] phase of the proceeding until a week before the trial" and "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records." 529 U.S. at 395, 120 S.Ct. 1495 (emphasis added).

In this case, counsel failed to conduct an investigation into Pinholster's background-not through any mistake of law, but through apathy or negligence. This hardly seems to be a more defensible strategic choice. Although in certain cases counsel may have "sound reason to think it would have been pointless to spend time and money on ... additional investigation," and hence counsel's failure to uncover additional mitigating evidence would not be unreasonable, here there was no investigation into Pinholster's background at all, beyond interviewing his mother. *Rompilla*, 545 U.S. at 383, 125 S.Ct. 2456. Where no meaningful investigation is even attempted, counsel could hardly have developed any "sound reason" to think that "*additional* investigation" would be fruitless. *Id.* (emphasis added); *see also id.* at 389, 125 S.Ct. 2456 (explaining that conducting further investigation may not be necessary "when a lawyer *truly has reason to doubt* " that further useful mitigating information will be found) (emphasis added). Here counsel not only conducted the very barest kind of investigation, they failed to conduct any follow-up investigation into the limited mitigating evidence that they *did* learn from Pinholster's mother, such as evidence that Pinholster suffered from epilepsy. Thus even where counsel developed "sound reason" to believe that further investigation would yield fruitful evidence, counsel utterly neglected that duty. *Id.*

Lastly, contrary to Chief Judge Kozinski's suggestion, counsel could not have made a "rational decision" to pursue a mitigation strategy that relied solely on Pinholster's mother's inaccurate testimony, when counsel failed to explore meaningfully any other options. *See* Concurring Op. at 774. As the

Court has explained, the question is "not whether counsel should have presented a mitigation case," but "whether the investigation supporting counsel's decision not to introduce mitigating evidence of [the defendant's] background *was itself reasonable*." *See Wiggins*, 539 U.S. at 523, 123 S.Ct. 2527. Even if one could hypothesize a world in which relying on Pinholster's mother's testimony and eschewing a mental defect defense was a reasonable defense strategy, Pinholster's counsel could not have made such a strategic decision where they "abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Id.* at 524, 123 S.Ct. 2527. Counsel's failure to investigate here was even more flagrant than in *Williams*, *Wiggins* or *Rompilla*, and so was manifestly unreasonable under clearly established Supreme Court law.

B.

1.

The majority holds that even if the performance of Pinholster's counsel was deficient, it was not objectively unreasonable for the state court to rule that Pinholster was not thereby prejudiced. In reaching this conclusion, the majority minimizes or ignores much of the mitigating evidence that Pinholster could have presented, overstates the value of what little mitigating evidence was actually put before the jury, and exaggerates the aggravating evidence that was introduced against him. The majority thus imposes a much more stringent test for prejudice than is required by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80

L.Ed.2d 674 (1984), and its progeny. While it is true that Pinholster must demonstrate that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," the Court has emphasized that a reasonable probability is less than the preponderance more-likely-than-not standard. *See Strickland*, 466 U.S. at 693-94, 104 S.Ct. 2052;*see also Rompilla*, 545 U.S. at 393, 125 S.Ct. 2456 ("[A]lthough we suppose it is possible that [the sentencer] could have heard it all and still decided on the death penalty, that is not the test."). The gap between the evidence that was presented and what could have been presented is more than sufficient to "undermine confidence in the outcome" of the proceeding. *See Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

Beginning with the available mitigating evidence, the majority ignores or downplays much of the probative information that Pinholster could have presented at trial. First, the "years of significant neglect and physical and emotional abuse" that Pinholster experienced as a child were not, as the majority implies, limited to the beatings by his stepfather and grandmother. Maj. Op. at 767. His birth father, Garland Pinholster, abandoned the family when Pinholster was an infant. Pinholster's family was extremely poor, to the point that the children would sometimes mix flour and water when they were hungry. Neither Pinholster's stepfather nor his mother evinced any concern for Pinholster and his siblings. Indeed, Pinholster's mother often laughed when her children behaved inappropriately, encouraged them to steal from nearby rail cars and dressed the children in rags while buying mink coats

for herself.

Second, the lives of Pinholster's siblings were worse than the majority indicates. Pinholster's half-sister, Tammy Brashear, was convicted of prostitution and forcible sexual battery, and became a ward of the juvenile court when she was 16. Pinholster's brother, Alvin Pinholster, was arrested for robbery, rape, sodomy and other offenses, suffered from severe depression and schizophrenia and eventually committed suicide. Pinholster's other brother, Terry Pinholster, suffered from depression and became a user of PCP. And Pinholster's half-brother, Guy Pinholster, suffered from depression as well as bipolar mood disorder, and was frequently beaten by his father.

Third, Pinholster's own medical history is more problematic than the majority acknowledges. He suffered his first head injury at age two when he was run over by his mother's car, resulting in a two-week hospital stay. He suffered a second severe head injury a year later, during a car accident in which Pinholster's head hit the front windshield hard enough to shatter the glass. According to Dr. Woods, these injuries at the very least supported a post-traumatic diagnosis, and may have accounted for the abnormal EEG that Pinholster recorded as a child. Similarly, Dr. Olson and Dr. Vinogradov stated that the injuries damaged Pinholster's brain and caused him to become more aggressive, while Dr. Stalberg described the injuries as potentially "devastating" and linked them to Pinholster's epilepsy. That epilepsy was severe enough that Pinholster was prescribed medication from age nine onward and repeatedly suffered complex partial and grand mal

seizures. Different doctors also diagnosed Pinholster with bipolar mood disorder (Dr. Woods) and personality change due to childhood head trauma (Dr. Olson and Dr. Vinogradov), while agreeing that he was epileptic. At age 11, Pinholster spent more than four months in a mental institution.

Fourth, the majority does not even acknowledge that Pinholster had severe learning disabilities in school and was socially isolated and maladjusted as a child. According to his elementary school teacher, Lois Rainwater, Pinholster "had no friends at all," "seemed incapable of relating either to his peers or to adults," "seemed like a child who got no attention or structure at home" and "fell through the cracks emotionally and every other way." Lastly, Pinholster had a history of abusing alcohol, nicotine, marijuana, and heroin. He started drinking alcohol, smoking, sniffing glue and paint and using marijuana between the ages of 10 and 12; using Seconal and downers between the ages of 13 and 14; and using heroin and cocaine between the ages of 14 and 16. On the night of the events in question, Pinholster was heavily intoxicated with both alcohol and drugs.

Instead of discussing this substantial available mitigating evidence that was not put before the jury, the majority instead dwells on an interview Pinholster gave to a social worker in 1991, where he downplayed the extent of the abuse he suffered as a child. *See* Maj. Op. at 767-68. Although the majority acknowledges that Pinholster's stepfather "frequently beat Pinholster with his fists, a belt, or anything else available, including a two-by-four board," the majority nonetheless focuses on

Pinholster's-the abused child's interpretation of these events as nothing but "discipline" that "benefitted" him and his brothers. *Id.* at 767. Further, while the majority goes on at length about the positive relationship Pinholster may have with his maternal grandfather, Pinholster's uncle and aunt testified that it was Pinholster's *grandmother* who would frequently "beat the hell out of" Pinholster from the time when he was a toddler. Every medical professional who evaluated Pinholster concluded that he suffered severe abuse and neglect in his childhood. Further, multiple doctors who evaluated Pinholster noted his tendency to portray his own history inaccurately or minimize the seriousness of his childhood trauma so as to maintain a facade of personal control. The majority's emphasis on Pinholster's rationalization of his mother's neglect therefore seems rather myopic if not disingenuous.

The majority also attempts to minimize the evidence of Pinholster's substantial neurological and emotional disorders by emphasizing disagreements among the experts as to some diagnoses, and stating that "the only constant with regards to the evolving defense expert testimony has been Dr. Stalberg's diagnosis of Antisocial Personality Disorder and the experts' agreement that it is reasonably probable that Pinholster suffered from epilepsy." Maj. Op. at 770. It is unclear why the majority dismisses the importance of these diagnoses, which are clearly sufficient of themselves to indicate an organic basis for some of Pinholster's behavior. Further, Dr. Woods concluded that Pinholster suffered from bipolar mood disorder and Dr. Olson and Dr. Vinogradov concluded that Pinholster suffered from brain damage attributable to childhood trauma, which may have

explained in part his aggressive behavior. Even if not all experts concurred on the exact set of diagnoses, numerous doctors agreed that Pinholster suffered from psychological disorders that may have influenced his criminal acts. Further, this medical testimony might have also affected the jury's interpretation of Pinholster's guilt phase testimony, again by suggesting an organic basis for his tendency to exaggerate his past. Yet none of this medical evidence or testimony was put before the jury to evaluate, and the majority acknowledges that it has no reason to doubt the credibility of these medical professionals.

The majority also gives too much credit to the penalty phase testimony of Pinholster's mother, Burnice Brashear. While Brashear's testimony did include some "mitigating evidence," *see id.* at 768-as was inevitable given Pinholster's horrific childhood-the overall impression she conveyed of Pinholster's upbringing was not just incomplete but actually untrue. Contrary to her statements in court, Pinholster's siblings were not "[b]asically very good children," and they got into much more than "small trouble" with drugs, alcohol and the law. The beatings that Pinholster endured at the hands of his stepfather were quite certainly child abuse, not mere "discipline" or "arguments and hassles," as Brashear also characterized them. Pinholster and his siblings did not have "everything normally material-wise that most people have," "decent clothes" and "a nice house," but instead suffered from malnutrition, lack of clothing and neglect. Pinholster's epilepsy was first diagnosed at age nine, not after he was beaten at age 18. And Pinholster did not do "much better" at school after being diagnosed with "perceptive vision" and

moved to a different classroom; rather, his academic performance continued to decline, and by his teenage years he was being shuffled from one institutional setting to another. Instead of minimizing the damage done by Brashear's testimony, I would simply adhere to the conclusions of Dr. Stalberg and the district court. Dr. Stalberg described Brashear's statements as "profoundly misleading," while the district court opined that "[t]he available evidence 'was far different from the unfocused snapshot' presented by Pinholster's attorneys at trial." Hence the majority attributes false weight to the jury's supposedly "obvious rejection of such mitigating circumstances." *Id.* at 768. The jury was not presented with an accurate picture of the mitigating circumstances, so it hardly could have rejected them.

Finally, the majority not only overvalues Brashear's testimony, but also ignores the way in which its deficiencies were turned against Pinholster by the prosecution. During the penalty phase closing arguments, the State was able to claim, on the basis of Brashear's inaccurate statements, that Pinholster had resorted to crime and violence even though he "came from a good home," "was not a deprived child" and "had many things going for him, probably more than many children." The State also was able to discount Brashear's testimony about Pinholster's epilepsy-and indeed to accuse her of lying about it-by pointing to the complete lack of corroborating evidence as well as her own ignorance about the condition. On cross-examination, Brashear stated that she did not know what type of epilepsy Pinholster had, that she was unsure when she found out about the condition and that on one occasion she had taken Pinholster to a doctor and, as the

prosecutor put it, "lo and behold, just like that the doctor told them he had epilepsy." Brashear's flawed testimony, in combination with Pinholster's counsel's failure to present any other evidence in mitigation, thus made possible the State's devastating conclusion: "What did the defendant proffer in this particular case as to ask you to come back with anything less than death? ... Not one person except his mother." *Cf. Karis v. Calderon*, 283 F.3d 1117, 1139 (9th Cir.2002) (finding prejudice in part because "[t]he defense counsel's portrayal of [petitioner] as intelligent without any indication of his violent and abusive childhood afforded the prosecution a very effective argument," and enabled "[t]he prosecutor [to] emphasize[ ] the fact that [petitioner] was 'bright' and 'cunning' and that he 'well knew exactly what he was doing'").

2.

On the other side of the ledger, the majority describes the aggravating evidence that was introduced against Pinholster as "overwhelming." Maj. Op. at 766, 770. This evidence must not be understated, and Pinholster is obviously not a sympathetic person, but deeming the aggravating evidence "overwhelming" does not make it so. First, the murders themselves were not as heinous as many of the other terrible crimes that we have considered in capital cases. Pinholster did not intend to kill anyone when he went to Kumar's house, and indeed was surprised when the housesitters, Johnson and Beckett, arrived at the scene. Thus to the extent there was any premeditation, it formed immediately before the instant offenses took place, when a drunk, high and emotionally distraught Pinholster and his

two codefendants, Corona and Brown, suddenly discovered that they were not alone in Kumar's house. Moreover, Brown stabbed Johnson as well and said that he had "'buried his knife to the hilt'" in him, meaning that it is uncertain whether Pinholster was responsible for Johnson's fatal wounds. *See Pinholster*, 4 Cal.Rptr.2d 765, 824 P.2d at 582-84.

We have previously described a very similar crime as "in essence a robbery gone wrong." *Belmontes v. Brown*, 414 F.3d 1094, 1139 (9th Cir.2005), *rev'd on other grounds, Ayers v. Belmontes*, 549 U.S. 7, 127 S.Ct. 469, 166 L.Ed.2d 334 (2006). We commented in *Belmontes* that the murder, which involved the bludgeoning of a single victim with an iron bar during a robbery, "was not pre-planned, nor did it involve kidnapping, rape, torture ... or any of the other especially heinous elements that usually are present when a jury votes for the ultimate penalty." *Id.*; *see also Summerlin v. Schriro*, 427 F.3d 623, 641 (9th Cir.2005) (en banc) (noting that "instantaneous premeditation" is "not definitive for the purpose of establishing the especially heinous, cruel, or depraved aggravator"). Although Pinholster's crime was surely vicious, the facts of the crime were unfortunately far from extreme in either their depravity or cruelty. *See, e.g.*, *Hovey v. Ayers*, 458 F.3d 892, 898 (9th Cir.2006) (defendant abducted a young girl as she was walking home from school, sexually molested her and abandoned her on the side of the road with six skull fractures and 14 laceration wounds); *Fields v. Brown*, 431 F.3d 1186, 1202 (9th Cir.2005) (defendant was responsible for a "'one-man crime wave'" during which he committed "a murder and at least three kidnappings, rapes, and robberies within a three week period of time").

Second, the aggravating evidence introduced against Pinholster that pertained to incidents *other* than the murders themselves was also less severe than that in many of our previous cases. As the majority notes, Pinholster denied murdering Johnson and Beckett, referred to himself as a "professional robber," testified that he often scratched people's property, was convicted of kidnaping and received several disciplinary infractions while arrested and incarcerated. *See* Maj. Op. at 771-73 & n. 29. As presented to the jury, however, Pinholster's criminal record was not very extensive, as it did not include any convictions other than the kidnaping count. Moreover, although the majority believes this aggravating evidence was of overwhelming importance, the prosecutor did not actually refer to Pinholster's denial of his involvement in the murders, his prior robberies or his penchant for scratching property at any point during the penalty phase. Considering analogous aggravating evidence in *Belmontes*, we concluded that it was "not strong," but was "minimal" and "weak[ ]." 414 F.3d at 1106, 1139-40. The relevant facts in that case consisted of Belmontes' "previous[ ] incarcerat[ation] in the youth facility for being an accessory after the fact to voluntary manslaughter, one domestic violence incident, and two occurrences relating to possession, or possible possession, of a gun." *Id.* at 1139. Similarly, we noted that the prosecution presented "considerable" aggravating evidence in *Boyde v. Brown*, 404 F.3d 1159, 1179 (9th Cir.2005). The incidents introduced in that case included the petitioner's assaults on former classmates, his throwing bricks at a van, his theft of his stepfather's gun, his prior robberies, his drug use while

incarcerated and his plot to escape from prison. *See id.*

The majority dismisses the relevance of any comparisons between Pinholster's murders and other crimes, noting that under California law, the jury reviews only the facts in front of it and does not conduct a proportionality review by comparing the crime to others. *See* Maj. Op. at 772 n. 30. All jurors, however, consider a case against a background of social understandings and shared experiences about crime and criminals, which in turn influences their decision as to whether someone has committed an offense so heinous as to warrant the ultimate penalty. Indeed, the majority's emphasis on the lack of proportionality analysis in California law underscores the prejudice that resulted from counsels' failure to put forth the reams of the readily available mitigating evidence in Pinholster's case. Because the jurors could weigh *only* the aggravating and mitigating evidence presented to them, the omissions of and outright misrepresentations about mitigating evidence on Pinholster's side of the scale plainly left the jury with little to tip the balance toward life imprisonment over execution.

Finally, as discussed above, some of the aggravating evidence that the majority cites would never have been introduced had Pinholster's counsel not performed deficiently during the guilt phase of the trial. In particular, Pinholster's references to his own past robberies-probably the most damning testimony the jury heard, next to the details of the actual murders-and his statements about the swastikas and signatures he frequently scratched into other people's property would never have been

admitted. *See* Maj. Op. at 772-73. Competent representation during the trial's first stage would thus have further weakened the prosecution's argument during the penalty phase that Pinholster deserved the ultimate penalty.

3.

The mitigating evidence that Pinholster could have introduced was therefore substantially more compelling than the majority acknowledges, whereas the aggravating evidence was somewhat weaker. If the evidence on both sides of the ledger is fairly characterized, and evaluated in light of the Supreme Court's recent decisions in *Williams*, *Wiggins* and *Rompilla*, it is clear that the California Supreme Court's denial of Pinholster's penalty phase IAC claim was objectively unreasonable.

The available mitigating evidence in *Williams* was that the petitioner had been beaten by his father, that his parents had been imprisoned for criminal neglect, that he had been placed under the custody of the social services bureau for two years, that he was borderline mentally retarded, that he had helped crack a prison drug ring and that he had been a peaceful prisoner. *See* 529 U.S. at 395-96, 120 S.Ct. 1495. The aggravating evidence, on the other hand, was that the petitioner had been convicted of armed robbery, burglary and grand larceny prior to the murder for which he was sentenced to death, and that after the murder he perpetrated two auto thefts and two separate assaults on elderly victims. The jury also learned that he was convicted for setting a fire while in jail. *See id.* at 368-69, 120 S.Ct. 1495. In *Wiggins*, the available mitigating evidence was that

the petitioner experienced severe privation and abuse while in his mother's custody, that he was abused, sexually molested and raped while in foster care, that he was homeless for a period and that his mental capacity was diminished. *See*539 U.S. at 535, 123 S.Ct. 2527. The only aggravating evidence was that the petitioner had drowned his elderly victim and ransacked her apartment; he had no record of violent conduct before or after the murder. *See id.* at 514, 537, 123 S.Ct. 2527. Finally, the available mitigating evidence in *Rompilla* was that the petitioner grew up in a slum, that he was abused by his father, that his parents were alcoholics, that he consumed too much alcohol, that he was mentally retarded and that he suffered from organic brain damage. *See*545 U.S. at 390-93, 125 S.Ct. 2456. The aggravating evidence consisted of the petitioner's prior convictions for rape, burglary and theft, as well as his use of torture in committing the murder for which he was sentenced to death. *See id.* at 378, 125 S.Ct. 2456;*Rompilla v. Horn*, 355 F.3d 233, 237 (3d Cir.2004), *overruled by*545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005).

Although the majority asserts that Pinholster's available mitigating evidence "falls short when compared to the mitigating evidence available in *Williams*, *Wiggins*, and *Rompilla*," that evidence cannot be meaningfully distinguished from these cases. Maj. Op. at 770-71. Pinholster, Williams, Wiggins and Rompilla were all badly beaten by their parents. All four men grew up in extreme poverty with little to no parental attention. All four spent time in foster homes and other institutional settings as children. Pinholster and Rompilla suffered from organic brain damage, while Williams and Wiggins

were mentally retarded or close to it. And both Pinholster and Rompilla were addicted to alcohol.

Rather than heed these obvious similarities, the majority emphasizes the differences that inevitably exist between one person's life and another's. For instance, Williams, unlike Pinholster, behaved well while in prison and Wiggins, also unlike Pinholster, was sexually molested and spent time homeless. Maj. Op. at 770. These minor factual contrasts cannot be legally dispositive, particularly given that several aspects of Pinholster's available mitigating evidence have no parallel in *Williams*, *Wiggins* and *Rompilla*. Pinholster's mother, for example, did not just neglect him but rather actively encouraged his illegal activities. His siblings had serious problems with alcohol, drugs, mental health and the law. Pinholster himself is a lifelong epileptic prone to severe seizures. He was socially isolated and maladjusted as a child. His substance abuse issues began at an early age and involved an array of illegal drugs. And Pinholster's counsel did not just present incomplete information about him in mitigation, but rather allowed his mother to give inaccurate testimony that was then used against him by the prosecution. I do not necessarily contend that these differences make Pinholster's available mitigating evidence *more* powerful than that in *Williams*, *Wiggins* and *Rompilla*. They do, however, more than offset the supposedly meaningful contrasts that the majority identifies.

On the aggravating evidence side, I agree with the majority that *Wiggins* can be distinguished because the petitioner in that case, unlike Pinholster, "[did] not have a record of violent conduct that could

have been introduced by the State to offset th[e] powerful mitigating narrative." 539 U.S. at 537, 123 S.Ct. 2527;*see* Maj. Op. at 770-71. However, the aggravating evidence against Pinholster was not dispositively stronger than that in *Williams* and *Rompilla*. It is true, as the majority asserts, that Pinholster admitted to committing many past robberies in guilt phase testimony that would never have taken place had he been competently represented, and that the prosecutor never mentioned during the penalty phase and that he was an unusually problematic inmate. *See* Maj. Op. at 771-72 & n. 29. But Williams also committed theft-related offenses *both before* and after his homicide, and, unlike Pinholster, he was actually *convicted* of some of those crimes (namely his 1976 armed robbery and his 1982 burglary and grand larceny). There is also no analogue in Pinholster's criminal history to Williams' "two separate violent assaults on elderly victims perpetrated after the [relevant] murder," his proclivity for starting fires or the testimony by two expert witnesses that he would "pose a serious continuing threat to society." 529 U.S. at 368-69, 120 S.Ct. 1495. Rompilla, similarly, was actually convicted of burglary and theft. He was also convicted of rape-a more serious crime than any Pinholster committed before the instant murders-and tortured his homicide victim before finally putting him out of his misery. *See*545 U.S. at 378, 125 S.Ct. 2456; 355 F.3d at 257. Again, I do not necessarily argue that these differences make the aggravating evidence against Pinholster *weaker* than that in *Williams* and *Rompilla*. But I cannot accept the majority's conclusion that the aggravating evidence against Pinholster was dispositively worse.

Though the majority does not address them, it is also clear that none of the Supreme Court decisions that have upheld state court denials of petitioners' penalty phase IAC claims are as relevant here as *Williams*, *Wiggins* and *Rompilla*. In *Strickland*, "[t]he evidence that respondent says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge," and the aggravating factors were "overwhelming." 466 U.S. at 699-700, 104 S.Ct. 2052. The balance between available mitigating evidence and aggravating evidence was thus starkly different from *Williams*, *Wiggins*, *Rompilla* and the case before us. In *Burger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987), and *Bell v. Cone*, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002), the Court never reached the prejudice prong of the IAC inquiry because it concluded that the petitioners' lawyers had not performed deficiently. The aggravating evidence in *Burger* and *Bell* was also more severe than in this case, while the available mitigating evidence was less powerful. *See Bell*, 535 U.S. at 699, 122 S.Ct. 1843;*Burger*, 483 U.S. at 789-94, 107 S.Ct. 3114.*Woodford v. Visciotti*, 537 U.S. 19, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002), is inapposite for the same reason: The aggravating evidence, which included the knifing of one man and the stabbing of a pregnant woman, was "devastating" while the available mitigating evidence was not particularly potent. *Id.* at 26, 123 S.Ct. 357.*Schriro v. Landrigan*, 550 U.S. 465, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007), finally, dealt primarily with the extraneous issue of a petitioner instructing his lawyer not to mount a case in mitigation. The Court also explicitly labeled the available mitigating evidence in that case as "weak,"

and noted the petitioner's "exceedingly violent past" of murders, kidnappings and prison escapes. *Id.* at 1944. Accordingly, nothing in the Supreme Court's other penalty phase IAC decisions undermines my conclusion that we are bound here by *Williams*, *Wiggins* and *Rompilla*-and that those cases require us to hold that the California Supreme Court's denial of Pinholster's penalty phase IAC claim was objectively unreasonable.

III.

The California Supreme Court's summary denial of Pinholster's penalty phase IAC claim was an objectively unreasonable application of *Strickland*. The performance of Pinholster's counsel at the penalty phase was plainly deficient; and the available mitigating evidence in his favor and the aggravating evidence against him-when they are fairly characterized-render this case materially indistinguishable for purposes of prejudice from *Williams* and *Rompilla*. I therefore dissent. I would remand for the district court to issue a writ vacating Pinholster's sentence, unless within a reasonable time set by the court the State conducts a new penalty phase trial or imposes a lesser sentence consistent with law.

APPENDIX C

FILED
CLERK, U.S. DISTRICT COURT
APR 3, 2003
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION AT SANTA ANA
BY [INITIALS] DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SCOTT LYNN PINHOLSTER, Petitioner, v. JEANNE WOODFORD, Warden, California State Prison at San Quentin, Respondent.	CASE NO. CV 95-6240-GLT **DEATH PENALTY CASE** ADDENDUM TO ORDER GRANTING WRIT

The Court augments its Order granting writ of Habeas Corpus as follows:

1. No Effect of Supreme Court's new Garceau case.

On March 25, 2003, the Court filed an order granting the writ of habeas corpus concerning Pinholster's death sentence. On that same date, the Supreme Court issued *Woodford v. Garceau*, ___ U.S. ___, 2003 WL 1477291 (March 25, 2003), holding the Antiterrorism and Effective Death Penalty Act ("AEDPA") applies in capital habeas cases unless an "application for habeas relief seeking an adjudication on the merits of the petitioner's claims" was filed by the effective date of the statute, April 24, 1996.

Pinholster filed his petition for writ of habeas corpus on April 22, 1997. Therefore, the AEDPA applies to his case. The Court, however, has reviewed the provisions of the AEDPA and finds that it does not effect the March 25, 2003, disposition of this case.

(a) Statute of Limitation:

Under the AEDPA, a capital prisoner must file a federal petition within one year of the date on which the state conviction becomes final. 28 U.S.C. § 244(d)(1). Prisoners, like Pinholster, "whose convictions became final prior to AEDPA's enactment, had a one-year grace period in which to file their petitions[,]" i.e., until April 24, 1997. *Patterson v. Stewart*, 251 F.3d 1243, 1245 (9th Cir. 2001). Pinholster filed his petition on April, 22, 1997, within the required time.

(b) Evidentiary Hearing:

The AEDPA imposes restrictions on whether an evidentiary hearing may be granted. "Before the enactment of the AEDPA, the decision concerning an

evidentiary hearing with respect to a habeas petition was firmly committed to the discretion of the district courts, subject to some judicially-created limitations on that discretion." *Baja v. Ducharme*, 187 F.3d 1075, 1077-1078 (9th Cir. 1999). "The amendments contained in the AEDPA, by contrast, impose 'an express limitation on the power of a federal court to grant an evidentiary hearing,' . . . and have reduced considerably the degree of the district court's discretion." *Id.* Under the AEDPA, a petitioner is not entitled to an evidentiary hearing if he failed to develop the factual basis of a claim in state court. 28 U. S.C. § 2254(e)(2). "[A] failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams v. Taylor*, 529 U.S. 420, 432 (2000). "Diligence for purposes of the opening clause depends upon whether t he prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court; it does not depend upon whether those efforts could have been successful." *Id.* at 435. "Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Id.* at 437.

Pinholster sought an evidentiary hearing in state court regarding his claim that counsel was ineffective for failing to investigate and present mitigating evidence at the penalty phase. He did not fail to develop the factual basis of this claim in state court and an evidentiary hearing was appropriate.

(c) Deference to State Court Adjudication of Claims on the Merits:

Finally, the AEDPA limits the federal court's review of claims t hat were decided by the state court on the merits. Under 28 U.S.C. §2254(d)(1), "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

The California Supreme Court did not adjudicate Pinholster's claim that counsel was ineffective for failing to investigate and present mitigating evidence at the penalty phase. The AEDPA does not affect the court's grant of the writ on that claim.

2. Correction of typographical errors.

To correct a typographical error in the March 25, 2003 order, the word "Louis" is changed to "Lois" at page 12, line 14, and page 13, line 17.

Dated: April 2, 2003.

[Signature]
GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE

APPENDIX D

FILED
CLERK, U.S. DISTRICT COURT
MAR 26, 2003
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION AT SANTA ANA
BY [INITIALS] DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SCOTT LYNN PINHOLSTER, Petitioner, v. JEANNE WOODFORD, Warden, California State Prison at San Quentin, Respondent.	CASE NO. CV 95-6240-GLT **DEATH PENALTY CASE** JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Petitioner Scott Lynn Pinholster's First Amended Petition for Writ of Habeas Corpus is GRANTED with respect to his sentence of death and DENIED with respect to the remaining claims.

IT IS FURTHER ORDERED that the State of California shall VACATE and SET ASIDE the sentence of death unless within 90 days of the entry of judgment herein the State of California grants Pinholster a new trial regarding sentencing. If the State does not elect to retry Pinholster, the Superior Court shall VACATE his sentence of death and resentence him in accordance with applicable California law and the united States Constitution.

IT IS FURTHER ORDERED that the Clerk of this Court shall immediately notify the Warden of San Quentin Prison of this Court's judgment.

IT IS SO ORDERED.

Dated: March 26, 2003.

[Signature]
GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE

APPENDIX E

FILED
CLERK, U.S. DISTRICT COURT
MAR 25, 2003
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION AT SANTA ANA
BY [INITIALS] DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SCOTT LYNN PINHOLSTER, Petitioner, v. JEANNE WOODFORD, Warden, California State Prison at San Quentin, Respondent.	CASE NO. CV 95-6240-GLT **DEATH PENALTY CASE** ORDER GRANTING WRIT OF HABEAS CORPUS

Following recent Ninth Circuit authority, the writ of habeas corpus is granted concerning Petitioner's death sentence for inadequacy of defense counsel in investigating and presenting mitigation evidence at the penalty phase of petitioner's trial.

I. BACKGROUND

Petitioner Scott Lynn Pinholster, a prisoner on California's death row, sought a writ of habeas

corpus challenging his state court conviction and death sentence. The court ruled on the majority of Pinholster's claims in its August 14, 2000 order regarding his motion for evidentiary hearing and the parties' cross-motions for summary judgment. In that order, the court granted an evidentiary hearing on Claims 58, 64, and 66, reserved judgment on Claims 59, 62, 63, 70, 72, and 73, and granted Respondent's motion for summary judgment on all remaining claims.

The court held an evidentiary hearing on September 10, 11, and 12, 2002. After considering the testimony and exhibits presented at the hearing, and the parties' post-hearing briefing, the pending claims are ready for decision.

II. DISCUSSION

The Court grants the petition for inadequacy of counsel by failure to investigate and present mitigation evidence at the penalty hearing, but denies the remaining claims.

A. Claim 58 -- Failure to Investigate and Present Evidence in Mitigation at penalty Hearing

Pinholster contends his trial attorneys were ineffective for failing to investigate and present mitigating evidence during the penalty phase of his case. To prevail on a claim of ineffective assistance of counsel, a petitioner must show that his attorney's performance was deficient and that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

1. Counsel's Performance

Counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691; *see also Hendricks v. Calderon*, 70 F.3d 1032, 1036 (9th Cir. 1995) (counsel is deficient if he/she "neither conducted a reasonable investigation nor demonstrated a strategic reason for failing to do so"). In preparation for the penalty phase of a capital trial, counsel has an "obligation to conduct a thorough investigation of [a defendant's] background." *Williams v. Taylor*, 529 U.S. 362, 396 (2000); *see also Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999) ("It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase."). Counsel is deficient if he/she fails to "conduct more than a cursory investigation" and makes "no attempt to humanize [the defendant] before the jury." *Siripongs v. Calderon*, 35 F.3d 1308, 1316 (9th Cir. 1994). In Pinholster's case, the evidence shows his trial attorneys failed to conduct an adequate investigation regarding the penalty phase.[1] At the close of the guilt phase, Pinholster's attorneys admitted on the record that they had not "prepared any evidence by way of mitigation," and passed up on an opportunity for a continuance to prepare. (Reporter's Transcript ("RT") 7250-7258). Billing records show that counsel spent only 6.5 hours preparing for the penalty

[1] Neither of Pinholster's trial attorneys was available to testify at the evidentiary hearing as both are deceased. The state court record and evidence presented at the hearing provide sufficient evidence that counsel's performance was deficient.

phase.[2] (Evidentiary Hearing Exhibit ("Ex.") 72).

At trial, counsel called only one witness, Pinholster's mother, Burnice Brashear. Her testimony was brief, encompassing 32 transcript pages. (RT 7388-7420). It also was damaging, incomplete, and inaccurate.[3] Although Burnice testified about Pinholster's childhood head injuries and epilepsy, the incidents were unexplained by expert testimony, leaving the jury with the inability to make a reasoned judgment about the evidence. *See Mayfield v. Woodford*, 270 F.3d 915, 927 (9th Cir. 2001) ("'To perform effectively in the penalty phase of a capital case, counsel must conduct sufficient investigation and engage in sufficient preparation to be able to 'present[] and explain[] the significance of all the available [mitigating] evidence.'") (quoting *Williams*, 529 U.S. at 393, 399); *Caro*, 165 F.3d at 1227 ("The jury did not have the benefit of expert testimony to explain the ramifications of these experiences on Caro's behavior. Expert evidence is necessary on such issues when lay people are unable to make a reasoned judgment alone.").

The record shows counsel's actions were not the result of a reasonable strategic decision. Counsel believed there would be no penalty phase because they had not received notice of the aggravating

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[2] The records reflect that, on April 11, 1984, counsel billed 1.5 hours to "[s]tart prep. for penalty phase." (Ex. 72). Counsel billed 3.0 hours on April 25, 1984, for "[p]rep. penalty phase and conf. with Mrs. Brashear," and billed another 2.0 hours on April 26, 1984, for "[p]rep. penalty phase." *Id.*

[3] This issue is discussed more fully in the prejudice analysis.

evidence that the State intended to introduce.[4] (RT 7249-7250). After learning of their mistake, counsel elected to proceed without a continuance because they did not think the passage of time "would make a great deal of difference." (RT 7257-58). Even if the State had failed to give adequate notice of its intent to introduce additional aggravating evidence, that would not have relieved counsel from their obligation to investigate mitigating evidence. In seeking the death penalty, the State could have simply relied solely on the evidence presented during the guilt phase. *See* CAL. PENAL CODE § 190.3 (a) (in determining whether to impose the death sentence, the jury is allowed to consider the "circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true . . . ."). At the least, counsel had an obligation to investigate Pinholster's background to counter the nature of the crimes for which he was convicted. Here, however, even upon learning of their mistake, counsel did not request a continuance to conduct an investigation. Instead, they made an uninformed decision that the passage of time would not "make a great deal of difference." Such an uninformed decision cannot be the basis for a reasonable strategic decision. *Jennings v. Woodford*, 290 F.3d 1006, 1014 (9th Cir. 2002) ("Although defense counsel is empowered to make such strategic decisions, *Strickland* demands

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[4] The trial court held a hearing on that issue and found adequate notice had been served on Pinholster during a period he was representing himself before his trial attorneys were appointed. *See* Order Regarding Petitioner's Request for Evidentiary Hearing, August 14, 2000, 9 n.1).

that such decisions be reasonable and informed.").

Because Pinholster's attorneys failed to conduct an adequate investigation and lacked a reasonable strategic reason for doing so, their performance was deficient. *See Jackson v. Calderon*, 211 F.3d 1148, 1161-62 (9th Cir. 2000) (deficient performance found where counsel did not prepare a penalty phase case because he didn't expect the trial would reach the penalty phase).

Pinholster's attorneys also failed to adequately prepare Dr. John Stalberg, the mental health expert whom they retained to examine their client. In preparing an expert to conduct an examination concerning the penalty phase, counsel must "seek out [evidence of the defendant's background] and bring it to the attention of the experts." *Wallace v. Stewart*, 184 F.3d 1112, 1118 (9th Cir. 1999) (*citing Hendricks*, 70 F.3d 1032); see also *Clabourne v. Lewis*, 64 F.3d 1373, 1385 (9th Cir. 1995) (counsel was ineffective where he failed to provide experts with materials they needed to "develop an accurate profile" of the defendant's mental health). Counsel has "a professional responsibility to investigate and bring to the attention of mental health experts who are examining his client, facts that the experts do not request[.]" *Wallace*, 184 F.3d at 1116.

Counsel did not retain Dr. Stalberg to examine Pinholster until after the trial started. *See Bloom v. Calderon*, 132 F.3d 1267, 1271 (9th Cir. 1997) (counsel's performance found deficient where he obtained an expert only a few days before trial); *Clabourne*, 64 F.3d at 1384 (counsel was deficient where he obtained an expert just days before he

testified). Pinholster's attorneys failed to provide Dr. Stalberg with important materials, including medical and school records, that would have been necessary for him to conduct a thorough evaluation. (Declaration of Dr. John Stalberg ("Dec. Stalberg"), August 29, 2002, 3-5). This was deficient.

Respondent argues counsel made a reasonable strategic decision not to conduct an investigation. Respondent contends that, "[h]aging consulted a qualified psychiatrist and interviewed Petitioner and his mother, trial counsel understood the value and pertinence of the old saw: when you're in a hole, stop digging." (Respondent's Post-Hearing Brief ("Resp. Br."), 28). This understates the standard of care an attorney owes a client facing the "ultimate penalty of death." *Estelle v. Smith*, 451 U.S. 454, 462 (1981). In such circumstances, counsel has an "obligation to conduct a thorough investigation of [a defendant's] background." *Williams*, 529 U.S. at 396 (emphasis added). Pinholster's attorneys did not make an informed decision to discontinue their investigation. Rather, they made an uninformed decision that conducting further investigation would not "make a great deal of difference."

Respondent also asserts counsel did not conduct an investigation because Pinholster directed them not to do so. (Resp. Br., 27). Respondent relies on an interview report prepared by a defense investigator, Sheryl Duvall, on July 16, 1991. (Ex. 238). According to the report, Pinholster told Duvall "he had instructed his trial attorney not to put on a penalty defense" and was upset that his mother testified on his behalf. *Id.* Neither Pinholster nor Duvall testified at the evidentiary hearing either by

declaration or in person. This statement is hearsay.

But, even if true, Pinholster's desire not to present a case did not relieve counsel of their responsibilities. "A defendant's insistence that counsel not call witnesses at the penalty phase does not eliminate counsel's duty to investigate mitigating evidence or to advise the defendant of the potential consequences of failing to introduce mitigating evidence, thereby assuring that the defendant's decision regarding such evidence is informed and knowing." *Williams v. Woodford*, 306 F.3d 665, 720 (9th Cir. 2002) (*citing Silva v. Woodford*, 279 F.3d 825, 838 (9th Cir. 2002)). There is no evidence counsel advised Pinholster of the consequences of electing not to introduce mitigating evidence. To conclude counsel did so would be contrary to the evidence in this case, i.e., counsel's on-the-record statement that they did not prepare a case in mitigation because they did not think there would be a penalty phase.

2. Prejudice

Pinholster suffered prejudice as a result of his attorneys' deficient performance. The relevant inquiry regarding prejudice is "whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694; see also *Mayfield*, 270 F.3d at 929 (the court "must reverse (a petitioner's] death sentence if [it) cannot conclude with confidence that the jury would

unanimously have sentenced him to death if [counsel] had presented and explained all of the available mitigating evidence"). A reasonable probability is less than a preponderance. *Strickland*, 466 U.S. at 693-694 ("[A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case . . . . The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."). In determining whether Pinholster was prejudiced, this court compares the evidence that "actually was presented to the jury with the evidence that might have been presented had counsel acted differently.'" *Murtishaw v. Woodford*, 255 F.3d 926,940 (9th Cir. 2001) (*quoting Bonin v. Calderon*, 59 F.3d 815, 834 (9th Cir. 1995)).

a. Evidence Presented At Trial

Burnice Brashear testified that, as a child, Pinholster "had a mind of his own" and was rebellious. (RT 7392-7393). Pinholster "would push to the limit," and they got into "quite a bit of arguments and hassles." (RT 7393). Pinholster's step-father would sometimes lose his temper as a result of Pinholster's behavior, but the relationship between the two was otherwise friendly. *Id.*

Pinholster suffered two head injuries as a small child. On one occasion, when Pinholster was two years old, Burnice ran over him with a car, hitting him "quite badly in the head" and tearing off an ear. (RT 7389-7391). The second incident occurred when Pinholster was four or five years old. He was

riding in the front passenger seat of a car and "went through the windshield" during an accident.[5] (RT 7391).

Pinholster began failing school in the first grade. (RT 7393). He fought and was disruptive. *Id.* In the third grade, Pinholster was diagnosed with "perceptive vision," i.e., he saw things backwards. (RT 7394). Pinholster was sent to an emotionally handicapped class where he did much better. *Id.* At home, however, Pinholster still provoked his brothers to fight. (RT 7395). He was a "big show-off" and a "big tease." *Id.* Pinholster was unlike his siblings, who were "[b]asically very good children." (RT 7401). Pinholster's siblings had been in only "small trouble" related to drugs and alcohol. *Id.* When Pinholster was ten years old, he began breaking into homes and stealing. (RT 7395). As a result, he was arrested and placed in juvenile hall. (RT 7396). At 12 years of age, Pinholster was committed to Camarillo State Hospital for six months. (RT 7402). According to his mother, Pinholster was not "materially deprived" as a child. She and his stepfather worked, and he always had a roof over his head and decent clothes. (RT 7403-7404).

Burnice learned that Pinholster had epilepsy after seeing the end of one of his seizures. (RT 7399). Pinholster developed epilepsy after he was beaten severely in jail with night sticks. (RT 7397). Burnice

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[5] Other reports indicate this incident occurred when Pinholster was three years old. (Declaration of Dr. Donald Olson ("Dec. Olson"), September 2, 2002, 3); (Declaration of Dr. Sophia Vinogradov ("Dec. Vinogradov"), September 2002, 7).

convinced Pinholster to see a family physician who prescribed medication for his seizures. *Id.*

b. Available Evidence

The available evidence presented to the Court "was far different from the unfocused snapshot" presented by Pinholster's attorneys at trial. *Bean v. Calderon*, 163 F.3d 1073, 1081 (9th Cir. 1998).

Burnice Brashear became pregnant by Garland Pinholster when she was 16 years old. They married and Burnice gave birth to a son, Alvin. Burnice gave birth to Pinholster when she was 20 years old. He was six weeks premature. Declaration of Dr. Sophia Vinogradov ("Dec. Vinogradov"), September 2002, 6). Burnice and Garland also had another son, Terry.

Garland drank, was unemployed, and was unfaithful to Burnice. (Declaration of Lois Fosberg ("Dec. Fosberg"), August 16, 2002, 2). They divorced after four and one-half years. (Declaration of Dr. F. David Rudnick ("Dec. Rudnick"), August 29, 2002, 3). Garland was absent from the rest of Pinholster's life. Garland married between nine and thirteen times depending on whether one includes his common-law wives and bigamous marriages. (Declaration of Joyce Anderson ("Dec. Anderson"), August 18, 2002, 2). Garland had mood swings and fits of anger. At times, he would stay up all night pacing the house, yelling and screaming. *Id.* at 1. He beat his son, Guy, from another marriage, and threatened to put one of his wives "six feet under." *Id.* During a custody dispute, Garland received a psychological evaluation and was diagnosed as Paranoid with a Narcissistic

Personality Disorder. *Id.* at 2.

After the divorce, Burnice worked at low-paying jobs and generally did not have enough money to provide for the children. (Dec. Fosberg, 2-3). Whenever she had any money, she spent it on herself first. *Id.* at 3. The children were dressed in rags while Burnice was "dressed to the nines." *Id.*; (Declaration of Keith Baumbach ("Dec. Baumbach"), August 23, 2002, 2).

Burnice was rarely home and the children were cared for by either Lois Fosberg, her 16-year-old sister who was attending high school, or her parents, Louis and Magdalena Baumbach. (Dec. Fosberg, 2-3). Louis was a Baptist preacher and "liked to lay down the law." (Dec. Baumbach, 1). Magdalena "beat the hell out of" Pinholster because he resembled Garland, whom she and her husband loathed. (Dec. Baumbach, 2; Dec. Fosberg, 3). The beatings began when Pinholster was one and one-half years old. (2 Evidentiary Hearing Transcript ("EH") 53). Magdalena would pick Pinholster out of the playpen by one or both arms and strike him across the back, bottom and legs. (2 EH 125). Pinholster did nothing to provoke the beatings. (2 EH 54). He was a bright, friendly, and honest young boy (Dec. Fosberg, 4), who had an outgoing personality and the most potential of all of the children. (2 EH 70).

Louis saw Pinholster after his mother struck him with her car. He was covered in blood and had two large wounds, one on his shoulder and one to his head "where his skin had been scraped off." (Dec. Fosberg, 3). Pinholster received "a lot of stitches in his head and shoulder," and they were bandaged. *Id.*

Keith Baumbach, Burnice's brother, saw Pinholster after the second car accident. His head was shaved and he wore a large bandage, almost like a cap, over the top of his head. (2 EH 122). The front end of the car was "wrecked." (Dec. Baumbach, 3). The windshield was shattered and there was a bulge on the passenger side where Pinholster's head had hit it from the inside. (2 EH 122).

When Pinholster was five years old, Burnice married Bud Brashear, "an angry, frustrated, bitter man." (Dec. Fosberg, 3). Bud also "drank all the time." (Dec. Baumbach, 3).

Bud expressed a lot of contempt for the children and stated that they needed "good thrashings." (2 EH 121). Bud beat the children with his fists, a belt and a two-by-four board. The beatings occurred a few times a week. (1 EH 137). Pinholster received the most frequent and violent beatings. (Dec. Vinogradov, 14). Bud believed Pinholster was the worst of the children and needed "really good lickings." (2 EH 121). Bud often beat Pinholster with a paddle on his head, back and shoulders. (Dec. Rudnick, 4). Pinholster was knocked out on a few occasions and did not receive medical attention. *Id.* Pinholster sometimes slept in the car after he was beaten. (Dec. Vinogradov, 14). Bud also made the children run around in circles until they nearly collapsed. *Id.* Other than beating them, Bud was "completely indifferent" to the children. (2 EH 57).

The family was "extremely poor" and the children did not get enough food. Louis once woke up in the middle of the night and observed the boys in the kitchen mixing flour with water to try to make

something to eat. (Dec. Fosberg, 4). The house was "filthy" and the children were "completely unsupervised." *Id.* They "ran wild" and "trashed wherever they were living." They "ruined apartments, furniture, everything." *Id.* "Typically, the family would stay in a place for a while, until the kids ruined it, and then skip out on the rent and move somewhere else." *Id.* The family generally lived in bad neighborhoods with lots of crime. *Id.*

The children also received no moral guidance. Burnice laughed when her children "did bad or illegal things" (Dec. Baumbach, 2) and sometimes bragged when they broke the law. (Dec. Fosberg, 4). Burnice encouraged the children to steal as long as they did not get caught. (Dec. Baumbach, 2).

Pinholster attended six different elementary schools by the time he was in the fourth grade. (Dec. Vinogradov, 14). Lois Rainwater, Pinholster's fourth grade teacher, described Pinholster as an intelligent and nice child. (2 EH 38). However, he was begging for attention and two grades behind in all academic areas. (Declaration of Lois Rainwater ("Dec. Rainwater"), August 22, 2002, 1). Pinholster also was extremely restless and hyperactive. (Dec. Rainwater, 1). He could not sit still and was constantly moving, talking, or throwing objects onto the floor. (2 EH 39-41). Because Pinholster's hyperactivity was so severe, Rainwater wondered whether it had an organic cause. (Dec. Rainwater, 1). Pinholster never acted violently or aggressively toward her or the other children. (Dec. Rainwater, 2; 2 EH 41-42). Rather, he was in "his own little world" and had no friends. (2 EH 43; Dec. Rainwater, 2). Rainwater arranged several appointments with Pinholster's mother to

discuss the situation. Burnice generally failed to attend the meetings and was unresponsive when she did attend. (Dec. Rainwater, 2). Because Pinholster was so disruptive in class, his attendance was limited to one hour per day and he eventually was moved to a special education class. (Dec. Rainwater, 3).

When Pinholster was 10 years old, his maternal grandfather died. This caused Pinholster to go into "emotional shock." (Dec. Vinogradov, 15). Pinholster began using drugs in the seventh grade. He smoked marijuana several times a day and became "hooked on reds" (Secondly), which he took daily with wine or beer. (Dec. Rudnick, 9). He also used acid occasionally, sniffed glue and used cocaine. (Dec. Rudnick, 9; Dec. Vinogradov, 10). In the eighth grade, heroin became his drug of choice and he became addicted to it, consuming several grams a day. (Dec. Rudnick, 9; Dec. Vinogradov, 15).

When Pinholster was 10 or 11 years old, he was arrested for burglary, theft and vandalism. He was placed in a home for emotionally disturbed boys and then admitted to Camarillo State Hospital for approximately five months. (Dec. Vinogradov, 15). He was diagnosed with "unsocialized aggressive reaction to childhood." He was further described as "explosive" and a "needy child who had a difficult time opening up. 1/ *Id.* at 9. Upon his discharge from the hospital, it was noted that he needed close relationships with warm and firm parental figures and a good foster home placement was recommended. *Id.* at 15.

Over the next five years Pinholster continued to commit burglaries and received nine different placements in juvenile hall and schools for troubled

boys. *Id.* at 15. Pinholster broke into houses to steal money and drugs. (Dec. Rudnick, 7). In 1978, when he was 19 years old, he was convicted of kidnaping and sentenced to prison. (Dec. Vinogradov, 15).

Pinholster was paroled in 1980. *Id.* A few months later, his older brother, Alvin, committed suicide. *Id.* at 16. Alvin was Pinholster's best friend and a father figure. The loss was devastating. Pinholster's drug use increased and he committed burglaries to support his addiction. *Id.* at 16. Pinholster later suffered another loss when his close friend William "Shotgun" Mintzner died in an auto accident. *Id.* at 16. The homicides for which Pinholster received the death penalty were committed on the night that he threw a party in honor of his friend, during which he consumed heroin, alcohol and marijuana. *Id.* at 16.

Pinholster's siblings have suffered from their share of serious problems. Alvin, who committed suicide, was charged with the rape and sodomy of a 14-year-old. *Id.* at 18. He was diagnosed with schizophrenia and found to be incompetent to stand trial. *Id.* Terry Pinholster, his younger brother, abused drugs and has been diagnosed with dysthymia or mild depression. *Id.* at 19. Tammy Brashear, a half-sister, began drinking alcohol when she was 11 years old. When she was 17 years old, she was arrested for sexually assaulting a 14-year-old girl. She also had arrests for prostitution and drug possession. *Id.* Guy Pinholster, a half-brother, was diagnosed with manic depression and prescribed Lithium. (Dec. Anderson, 3). He was admitted to two different psychiatric hospitals. Guy was subject to severe mood swings and temper tantrums if he did

not take his medication. He punched holes in the walls and beat his closet door to shreds. Gary Pinholster, another half-brother, was an alcoholic who had mood swings similar to Guy's. *Id.*

The parties introduced the following testimony regarding Pinholster's mental condition:

(1) Dr. Donald Olson, M.D.

Pinholster presented testimony from Dr. Donald Olson, an Assistant Professor of Neurology and Director of the Pediatric Epilepsy Program at the Stanford University Medical Center. (Declaration Dr. Donald Olson ("Dec. Olson"), September 2, 2002, 1). Dr. Olson concluded that Pinholster suffered from brain damage caused by the head injuries he received during his childhood car accidents. (1 EH 20-21). The second accident was more severe because it caused an acceleration-deceleration injury, i.e., the skull stopped moving, but the brain, which is free floating, kept moving and hit the inside of the skull. (1 EH 62). Olson concluded that, as a result of this accident, it was "very likely" Pinholster's frontal lobes were damaged. (1 EH 63). Frontal lobe injuries frequently cause attention problems and impulsive behaviors. (1 EH 81). A person with a frontal lobe injury would be more likely to commit the crimes for which Pinholster was convicted. (1 EH 85). Pinholster's brain damage was compounded by additional head injuries he received during beatings and fights.[6] (Dec.

[6] Pinholster reported receiving frequent blows to the head in fights from the seventh grade until he was 18 years old. (1 EH 70). He was struck by various objects and "knocked out" a few times. *Id.*

Olson 3). The number of head injuries suffered by Pinholster exceeded the normal number of traumas people generally sustain during childhood. *Id.*

Pinholster's frontal lobe brain damage was evidenced by the fact that he had an abnormal electroencephalogram ("EEG") when he was a nine years old. (1 EH 20-21, 63). The brain damage was further evidenced by the fact that Pinholster suffered from epilepsy. The epileptic seizures described by witnesses were convincing. Pinholster also received treatment with antiseizure medication, which showed that the physicians who treated him for the seizures were convinced that he had epilepsy. (Dec. Olson, 3).

Pinholster's I.Q. was within the average range. (1 EH 52). However, there was a split between Pinholster's verbal and performance I.Q. scores, which demonstrated an abnormality in brain function not inconsistent with brain injury. (1 EH 56). Although Pinholster received normal scores on neurological examinations, patients with epilepsy generally receive normal results and the tests do not measure frontal lobe function. (1 EH 49, 55, 64).

Seizures can be caused by cocaine use and withdrawal from sedating drugs, such as heroin, and alcohol. (1 EH 35-36). Pinholster's seizures, however, were more likely epileptic due to the number of head injuries he sustained as a child and the abnormal EEG. (1 EH 75, 78-79). Additionally, seizures caused by drug or alcohol withdrawal do not occur on a repeated basis as Pinholster's seizures did. (1 EH 79).

(2) Dr. Sophia Vinogradov, M.D.

Dr. Sophia Vinogradov is a board certified psychiatrist and an Associate Professor of psychiatry at the University of California, San Francisco. She is also Director of Research and Education for the Mental Health Service of the San Francisco Department of Veterans Affairs Medical Center. Her subspecialty is in schizophrenia and other chronic psychotic disorders.

Dr. Vinogradov diagnosed Pinholster with organic personality disorder. (3 EH 34). She believed the two car accidents Pinholster suffered as a child, in addition to other head traumas, resulted in a prefrontal cortical brain injury that caused a personality change. (3 EH 37-39). Dr. Vinogradov believed these head traumas, combined with psychological and environmental factors, explained his aggressive, violent and antisocial behavior. (3 EH 39-40). Dr. Vinogradov further noted the disparity between Pinholster's verbal and performance I.Q. scores was consistent with neuropsychological dysfunction. (3 EH 135).

Dr. Vinogradov ruled out a diagnosis of antisocial personality disorder because the data was better supported and more fully explained by a diagnosis of organic personality syndrome. (3 EH 63, 74). More specifically, there was an organic etiology for Pinholster's problems, i.e., his childhood head injuries. (3 EH 73).

With respect to the homicides, Dr. Vinogradov believed Pinholster became enraged, lost control, and "flew into a murderous attack." (3 EH 110, 122). Dr.

Vinogradov relied on the fact that Pinholster was intoxicated and there were multiple stab wounds.[7] Dr. Vinogradov also noted Art Corona's testimony that Pinholster "just went crazy," and that the robbery was otherwise calculated and well planned. (3 EH 126). Dr. Vinogradov explained that individuals who suffer from prefrontal cortex injury lose control and become violent with the slightest provocation. (3 EH 129).

(3) Dr. John Stalberg, M.D.

Dr. John Stalberg is a board certified psychiatrist and a diplomat in forensic psychiatry. Dr. Stalberg was retained by Pinholster's attorneys after the trial was in progress. He evaluated Pinholster and prepared a report. He did not speak with any family members and counsel never asked him to do so. (1 EH 118). Dr. Stalberg concluded Pinholster suffered from an antisocial personality disorder and there were no mitigating circumstances. After submitting his report to counsel, Stalberg never heard from them again. (1 EH 110-111).

Following the trial, Dr. Stalberg reviewed 5,000 pages of materials provided by Pinholster's habeas attorneys. (1 EH 109). Dr. Stalberg's diagnosis of antisocial personality disorder remained unchanged. (1 EH 163). He believed, however, that there was "voluminous mitigating evidence,"

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[7] Dr. Vinogradov noted the victims suffered four or five stab wounds. (3 EH 123). The testimony presented at trial, was that one victim received three stab wounds and the other victim received two stab wounds. (RT 5670, 5675).

including a childhood of physical abuse and emotional neglect, and a family history of mental illness and criminal behavior. (1 EH 113, 129-130). The lack of supervision Pinholster experienced during his childhood was a risk factor for antisocial personality behavior. (1 EH 135). The beatings Pinholster received also led to a desensitization to violence. (1 EH 138). According to Dr. Stalberg, individuals exposed to high levels of violence, "see it so much, live with it, it becomes a part of their life so they see nothing unusual about slugging somebody." *Id.* Pinholster was a just a child at the time and could not be blamed for his surroundings. (1 EH 135).

Dr. Stalberg also found significant Pinholster's behavior at Lisa Tapar's house on the night of the murders. (1 EH 128). Considering the hundreds of murder cases he had seen, Dr. Stalberg found that it was "bizarre" for Pinholster to engage in the behavior he did at the Tapar's house. He did not believe that it was indicative of a cold, calculated killer. (1 EH 184). Dr. Stalberg further opined that Pinholster quite likely suffered from epileptic seizures when he was arrested by Officer Guzman and Officer Kaufman, and when he struck his wife in the jaw. (1 EH 155, 157). Dr. Stalberg noted that a neurologist had described Pinholster's EEG as containing "[a]n unusually disorganized and abnormal pattern of brain waves." (1 EH 145-146). He also noted Pinholster was diagnosed with epilepsy in 1968 and was prescribed Dilantin, Phenobarbital, and Mysoline, the latter of which is used to treat epileptic seizures. (1 EH 146). Although Dr. Stalberg acknowledged it is always possible that Pinholster was faking, the conduct described was consistent with a genuine seizure. (1 EH 156). Dr. Stalberg also

explained that non-epileptics generally do not know how to fake a seizure. (1 EH 156).

(4) Dr. David Rudnick, M.D.

Dr. David Rudnick is a board certified neuropsychiatrist and former Medical Director of the Neurobehavior Clinic of the UCLA Neuropsychiatric Institute. Dr. Rudnick diagnosed Pinholster with an antisocial personality disorder. (Dec. Rudnick, 24). He also believed Pinholster suffered from a seizure disorder between the ages of 18 and 21 that was probably in remission. (Dec. Rudnick, 28, 35). He concluded the cause of the seizures was unclear and could be attributed to Pinholster's drug and alcohol use, and multiple head traumas. (Dec. Rudnick, 28). Dr. Rudnick opined, however, that Pinholster was not having a seizure when he committed the murders. According to Rudnick, the seizures could not explain Pinholster's complex, goal-directed and violent behavior on the night of the crimes. (Dec. Rudnick, 35).

Dr. Rudnick disputed Dr. Olsen's finding of brain injury. He noted Pinholster did not strike his head during the first accident, and the second accident was mild. (3 EH 145). Dr. Rudnick also disputed Dr. Vinogradov's finding of personality change on the basis of an organic injury because there was no established pattern of personality traits before Pinholster suffered his injuries at ages two and three. (3 EH 146).

c. Analysis of Prejudice

The Ninth Circuit Court of Appeals has

considered the following factors in determining whether a petitioner has suffered prejudice as a result of his attorney's deficient performance:

(1) the general importance of presenting background evidence,

(2) the strength of the state's aggravating evidence,

(3) whether the proffered evidence would have opened the door to damaging evidence,

(4) the prosecution's focus on the lack of mitigating evidence, and

(5) the length of the jury/s deliberations.

Each of these factors is discussed seriatim below:

(1) General Importance Of
Presenting Background Evidence

There is a "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Boyde v. California*, 494 U.S. 370, 382 (1990). "Evidence of mental problems may be offered to show mitigating factors in the penalty phase, even though it is insufficient to establish a legal defense to conviction in the guilt phase." *Hendricks*, 70 F.3d at 1043 (citing CAL. PEN. CODE §§ 190.3(d), (h)).

Additionally, "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Williams*, 529 U.S. at 398. *See also Deutscher v. Whitley*, 884 F.2d 1152, 1161 (9th Cir. 1989) ("The Constitution

prohibits imposition of the death penalty without adequate consideration of factors which might evoke mercy."), vacated on other grounds, 500 U.S. 901 (1991); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("The sentencer must also be able to consider and give effect to [mitigating] evidence in imposing sentence . . . . Only then can we be sure that the sentencer has treated the defendant as a 'uniquely individual human bein[g]' and has made a reliable determination that death is the appropriate sentence.") (citations omitted).

Background evidence was very important here. There was considerable mitigating evidence regarding Pinholster's dysfunctional, abusive and impoverished background that was available to counsel if they had sought to uncover it. Evidence was available that Pinholster was a bright, friendly, and honest child who had an outgoing personality and a lot of potential. However, he was abandoned by his father and raised by a mother who failed to supervise him and even encouraged his criminal behavior. He was routinely beaten by his grandmother as a small child and then later more severely by his stepfather, who struck him with a board, sometimes causing unconsciousness. The family lived in impoverished and crime-ridden neighborhoods, the home was filthy, and the children lacked enough food to eat. None of Pinholster's siblings survived this environment unscathed; each had their share of mental, criminal and substance abuse problems.

Pinholster did poorly in school from a young age. He displayed a severe hyperactive condition and had no friends. He began using drugs when he was in

the seventh grade and became addicted to heroin by the eighth grade. Pinholster committed burglaries in part to support his drug habit. The remainder of his formative years were spent in juvenile hall and schools for troubled boys. The beatings he received as a child, as well as two head injuries from childhood accidents, "very likely" caused frontal lobe damage, which causes attention problems and impulsive behaviors.

The Court of Appeals has found prejudice where counsel failed to present this type of background evidence regarding abuse, neglect, and mental impairments. *See Karis v. Calderon*, 283 F.3d 1117, 1136 (9th Cir. 2002) (prejudice found where counsel failed to present evidence of childhood abuse by stepfather); *Jackson v. Calderon*, 211 F.3d 1148, 1163 (9th Cir. 2000) (counsel's failure to present evidence of repeated childhood beatings, upbringing characterized by neglect and instability, and mental impairments constituted prejudice); *Silva v. Woodford*, 279 F.3d 825, 847 (9th Cir. 2002) (failure to present evidence of severe childhood abuse and neglect by alcoholic and impoverished parents, organic brain disorders, failure in school, and drug use constituted prejudice).

(2) Strength Of State's Aggravating Evidence

The aggravating evidence against Pinholster was strong. The underlying crimes were heinous. Pinholster beat the two murder victims, stabbed them with a knife, and took their wallets. The robbery netted $23 and a quarter-ounce of marijuana. In the same trial, Pinholster was

convicted of committing another residential robbery at gunpoint. When Pinholster took the stand in his defense, he denied the homicides, but boasted that he was a professional thief who had committed hundreds of robberies.

The State presented additional evidence that Pinholster had a conviction for kidnaping involving the use of a knife and assaulted another individual with a razor requiring 50 stitches. He had other incidents with the police in which he resisted arrest and assaulted officers. Pinholster also struck his wife in the jaw and broke it.

While incarcerated, Pinholster committed numerous disciplinary infractions. He threw urine at guards, threatened and assaulted them, and started fights with other inmates including one that was racially motivated. He was classified as a disciplinary problem and given a low calorie diet designed for the most recalcitrant inmates.

Where "aggravating circumstances are overwhelming, it is particularly difficult to show prejudice at sentencing due to the alleged failure to present mitigation evidence." *Bonin v. Calderon*, 59 F.3d 815, 836 (9th Cir. 1995). In *Bonin*, *Gerlaugh v. Stewart*, 129 F.3d 1027, 1033 (9th Cir. 1997), and *Williams v. Calderon*, 52 F.3d 1465, 1472 (9th Cir. 1995), the court found no prejudice due to the strength of the aggravating evidence presented during the penalty phase. Despite the strong evidence in aggravation, Pinholster's case is distinguishable from the cases finding no prejudice due to the strength of the aggravating evidence. Bonin was an unusually sadistic serial killer whose

crimes were especially heinous. Unlike Pinholster's case, the trial attorneys in *Bonin*, *Gerlaugh*, and *Williams* presented substantial evidence in mitigation.

It is more informative to compare Pinholster's case to those in which counsel failed to present essentially any evidence in mitigation. *See Bean*, 163 F.3d at 1080 ("For purposes of assessing prejudice, we find more guidance in 'those cases in which no mitigating evidence was put on than those cases in which cumulative evidence was put on.'") (*quoting Hendricks*, 70 F.3d at 1044). In the following cases, the court found prejudice where counsel's investigation was inadequate:

> (1) *Karis*, 283 F.3d at 1135-1136 (counsel presented mitigating evidence for only 48 minutes and failed to investigate defendant's background, including his violent and abusive childhood);
>
> (2) *Silva*, 279 F.3d at 829 (counsel failed to investigate and present evidence of childhood abuse, mental impairments and drug use);
>
> (3) *Mayfield*, 270 F.3d at 927 (counsel "never gave much thought to a penalty phase" and failed to conduct an adequate investigation);
>
> (4) *Ainsworth v. Woodford*, 268 F.3d 868, 874 (9th Cir. 2001) (counsel engaged in only minimal preparation for the penalty phase);
>
> (5) *Jackson*, 211 F.3d at 1161-62 (counsel failed to conduct investigation

out of belief that there would be no penalty phase and presented only two witnesses whose testimony covered less then 30 transcript pages);

(6) *Smith*, Joe Clarence v. Stewart, 189 F.3d 1004, 1008 (9th Cir. 1999) (counsel failed to investigate and present a penalty phase case because he did not understand what constituted mitigating evidence);

(7) *Smith, Bernard v. Stewart*, 140 F.3d 1263, 1269 (9th Cir. 1998) (counsel failed to conduct any "real investigation" into mitigating circumstances and presented no evidence at the penalty phase);

(8) *Hendricks*, 70 F.3d at 1043 (counsel conducted no investigation regarding the penalty phase);

(9) *Deutscher*, 884 F.2d at 1159 (counsel failed to investigate and present mitigating evidence);

(10) *Evans v. Lewis*, 855 F.2d 631, 636-639 (9th Cir. 1988) (counsel conducted no investigation regarding defendant's mental impairments).

The court's language in Deutscher is significant:

> Deutscher's state appointed lawyer failed to present any mitigation evidence at all. A finding that Deutscher was not prejudiced by this failure would deny Deutscher the chance to ever have a jury, Nevada's death penalty arbiter,

> fully consider mitigating evidence in his favor. Instead, secondhand bits and pieces of mitigation evidence would be analyzed and rebutted based only on speculation about what might have happened if dozens of important variables had been different. Allowing the death penalty to be imposed in that context would fall far short of the constitutional mark. We therefore reverse and remand for resentencing so that a jury can properly weigh mitigating and aggravating circumstances before deciding Deutscher's fate.

884 F.2d at 1161. *See also Hendricks*, 70 F.3d at 1044 ("The determination of whether to impose a death sentence is not an ordinary legal determination which turns on the establishment of hard facts. The statutory factors give the jury broad latitude to consider amorphous human factors, in effect, to weigh the worth of one's life against his culpability. Presumably the imposition of a death sentence is entrusted to a jury because it is a uniquely moral decision in which bright line rules have a limited place."); Ainsworth, 268 F.3d at 878 ("The jury was not given the opportunity to consider the disadvantaged background and the emotional and mental problems of the defendant in order to provide the individualized sentence required by the Constitution.").

The court has found prejudice even where the aggravating evidence was strong. See *Hendricks*, 70 F.3d at 1044 ("In light of the whole record, and

despite the substantial evidence of aggravation, we conclude that the failure of [counsel] to present mitigating evidence rendered the sentencing hearing neither fair nor reliable."); *Smith*, 189 F.3d at 1013 ("The horrific nature of the crimes involved here does not cause us to find an absence of prejudice. In Hendricks, we rejected the argument that heinous crimes make mitigating evidence irrelevant, noting that the factfinder in California has broad latitude to weigh the worth of the defendant's life."); *Mayfield*, 270 F.3d at 929 ("Even in the face of ... strong aggravating evidence," court could not conclude with confidence that the jury would unanimously have sentenced defendant to death if counsel had presented and explained all of the available mitigating evidence); see also *Lambright v. Stewart*, 241 F.3d 1201, 1208 (9th Cir. 2001) ("Evidence of mental disabilities or a tragic childhood can affect a sentencing determination even in the most savage case."); Smith, 140 F.3d at 1270 (where the State has presented aggravating evidence, it is "particularly critical that an attempt be made to present and argue mitigating circumstances").

While the aggravating evidence presented by the State was strong, the potential mitigating evidence regarding Pinholster's childhood abuse and mental problems, if believed, was also strong. The court therefore cannot "conclude with confidence" that the jury unanimously would have sentenced defendant to death if counsel had presented and explained all of the available mitigating evidence. *Mayfield*, 270 F.3d at 929.

(3) Whether The Proffered Evidence Would Have "Opened The Door" To Damaging Evidence

Respondent argues the evidence Pinholster now proffers should be given little weight because it would have opened the door to other aggravating evidence. (Resp. Br., 2). Specifically, Respondent argues Pinholster's diagnosis of antisocial personality disorder is harmful and militates against a finding of prejudice. (Resp. Br., 10-13).

In determining prejudice, the court has considered whether the evidence proffered at the evidentiary hearing would have opened the door to damaging evidence. In Gerlaugh, for example, the court found no prejudice as a result of counsel's failure to present a psychiatric expert who would have testified that the petitioner was a "remorseless, bullying sociopath who victimizes others merely for the macho thrill of proving his 'superiority' to his victims and his contempt for society's laws." 129 F.3d at 1033 (quoting State v. Gerlaugh, 144 Ariz. 449, 459 (1985)). "In its best possible light, it [was] a basket of cobras." *Id.* at 1035.

Here, there was conflicting evidence whether Pinholster suffers from an antisocial personality disorder. Even assuming, however, that such a diagnosis is correct, it is not necessarily harmful because it is explained by a history of parental abuse and neglect. The State's own witness, Dr. Stalberg, explained that Pinholster's lack of childhood supervision was a risk factor for antisocial personality behavior and the abuse he received led to

a desensitization to violence. (1 EH 135, 138).

A diagnosis of antisocial personality disorder could not have been more unfavorable than the evidence already presented to the jury at trial. It would have come as no great surprise to the jury that Pinholster was diagnosed with antisocial personality disorder - he murdered two people and admitted to committing hundreds of robberies. What the jury did not know is why Pinholster turned out the way he did, i.e., the factual basis for the diagnosis. The background evidence was crucial in humanizing Pinholster to the jury.

Pinholster offered substantial evidence that he suffers from an organic mental impairment. He received head injuries from two early childhood car accidents. In the second incident, he struck his head against the windshield with sufficient force to crack the window and cause an indentation. Pinholster regularly suffered other head injuries from beatings and fights throughout the remainder of his childhood. As a result of these injuries, Pinholster "very likely," some evidence would indicate, suffered frontal lobe damage and was at greater risk for committing the crimes for which he was convicted. Evidence of Pinholster's brain damage, along with his dysfunctional and abusive upbringing, outweighed any disadvantage in opening the door to a diagnosis of antisocial personality disorder.

(4) Prosecution's Focus On The Lack Of Mitigating Evidence

The impact of counsel's deficient performance

has been considered more harmful where the prosecution used the failure to present mitigating evidence to its advantage. In Karis, counsel failed to conduct an adequate investigation and presented "meager" evidence that Karis "exhibited artistic and academic talents." 283 F.3d at 1135. The court found that "[t]he defense counsel's portrayal of Karis as intelligent without any indication of his violent and abusive childhood afforded the prosecution a very effective argument" by allowing the prosecutor to emphasize "the fact that Karis was 'bright' and 'cunning' and that he 'well knew exactly what he was doing.'" *Id.* at 1139-1140.

Here, also, the State took advantage of counsel's meager case in mitigation. In summation, the prosecutor argued Pinholster had presented no evidence "except a mother who loves her son." (RT 4752). The prosecutor then discounted Pinholster's mother's testimony on the ground that even the most heinous person would have a mother who loved him. *Id.*

(5) Length Of Deliberations

The length of deliberations has been considered in determining whether there has been prejudice. *See Karis*, 283 F.3d at 1140 (jury was out for three days even though no substantial mitigating evidence was presented); *Mayfield*, 270 F.3d at 932 (jury deliberated for four hours, then asked whether verdict of life in prison had to be unanimous, and then deliberated for another full day before returning with a verdict).

In this case, the jury deliberated for at least

two and one-half days.[8] The length of deliberations is significant.

d. Conclusion

Pinholster has presented significant evidence of childhood abuse and mental impairments that would have been reasonably available to his trial attorneys. That evidence, combined with the prosecutor's accurate emphasis during summation on the lack of mitigating evidence and the length of the jury's deliberations, leads this Court to find he was prejudiced, that is, there is a reasonable probability that, had counsel properly investigated and presented the available evidence, the result of the sentencing proceeding would have been different. The degree of probability is sufficient to undermine confidence in the outcome. The Court cannot conclude with confidence that the jury would unanimously have sentenced Pinholster to death. The Court GRANTS relief on this claim.[9]

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[8] The jury retired to deliberate at 12:20 p.m. on Wednesday, May 2, 1984. (RT 7494). They deliberated all day on Thursday and Friday, and returned a verdict on Monday, May 7, 1984, at 11:45 a.m. (RT 7497).

[9] Respondent contends the diagnoses proffered through Drs. Olson and Vinogradov render the claim unexhausted and the petition should be dismissed. (Resp. Br., 3).

A claim is exhausted if it was "fairly presented" in state court. *Vasquez v. Hillery*, 474 U.S. 254, 257 (1986) (*quoting Picard v. Connor*, 404 U.S. 270, 275 (1971)). "(N)ew factual allegations do not render a claim unexhausted unless they

(continued...)

B. Claims 64 and 66 - Failure to investigate and object to incidents involving Jack Taube, Cathy Smith, Theodore MeSquita and Officers Kaufman and Guzman

Pinholster contends his attorneys were ineffective for failing to investigate and object to testimony by Jack Taube, Cathy Smith, Theodore Mesquita, and Officers Kaufman and Guzman. These witnesses testified about various acts of violence and assaultive behavior committed by Pinholster. Pinholster claims he was suffering from epileptic seizures during these incidents and that his attorneys were ineffective for failing to present

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(...continued)
'fundamentally alter the legal claim already considered by the state courts. '" *Chacon v. Wood*, 36 F.3d 1459, 1468 (9th Cir. 1994) (*quoting Vasquez*, 474 U.S. at 260).

In his state court petition, Pinholster claimed his attorneys were ineffective for failing to investigate and present mitigating evidence regarding his "serious mental impairment," including "organic mental disorders." State Pet. (Lodged Doc. C-1), 184. In support, he offered evidence of his childhood head injuries and beatings, problems in school, abnormal EEG, and epilepsy. *Id.* at 174-185. At the evidentiary hearing before this Court, Drs. Olson and Vinogradov merely elaborated on these factual allegations. Their testimony did not fundamentally alter the substance of Pinholster's claim. If anything, Pinholster's "inability to fully explore (the claim) stemmed from the state courts' refusal to grant him an evidentiary hearing on the matter, rather than from any failure of diligence on his part." *Weaver v. Thompson*, 197 F.3d 359, 364 (9th Cir. 1999). The "legal basis" for the claim "remained unchanged." *Id.*

evidence to that effect.

Conflicting testimony was presented during the evidentiary hearing on this claim. Dr. Stalberg opined that Pinholster was suffering from epileptic seizures during these incidents. (1 EH 155, 157). When interviewed by Dr. Rudnick, however, Pinholster denied having any seizures during police arrests, altercations with police, or fights. (Dec. Rudnick, 11). Pinholster bears the burden of proving that he is entitled to relief by a preponderance of the evidence. *McKenzie*, 27 F.3d at 1418-19. The Court finds he has failed to meet this burden. The claim is DENIED.

C. Claims 59, 62, 63, and 70

In these claims, reserved in the August 14, 2000, Order, Pinholster asserts his attorneys were ineffective for failing to object to inadmissible evidence offered in aggravation, including his juvenile offenses, his behavior while incarcerated, and his gang activity. Pinholster claims this evidence was inadmissible under California Penal Code § 190.3 (b).[10]

This Court does not review matters of California state law and, therefore, does not decide whether the evidence was improperly admitted under Section 190.3(b). *See Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991) (this court is "not a

[10] Under Section 190.3(b), the jury may consider "the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence."

state supreme court of errors; [it does] not review questions of state evidence law"). The California Supreme Court considered the admissibility of these incidents and determined that, with the exception of some incidents that were arguably inadmissible, the remainder of the evidence was properly admitted. *People v. Pinholster*, 1 Cal.4th 865, 961-962 (1992). The state court found Pinholster suffered no prejudice from the admission of the arguably inadmissible evidence in light of the other properly admitted evidence. The disputed evidence "clearly conveyed the impression" that Pinholster was an "intractable person who was not a good candidate for rehabilitation." *Id.* at 962-963. Other properly admitted evidence, including Pinholster's assaults and batteries, "gave a clear enough picture of this." *Id.* at 963. Additionally, "[d]efendant's own testimony depicted him as an unregenerate career criminal." *Id.*

Although this Court does not decide whether the evidence was properly admitted under state law, it is required to consider whether counsel was ineffective for failing to object to it. The court must make an independent determination whether Pinholster was prejudiced from his attorneys failure to object. *See Strickland*, 466 U.S. at 687. This Court deferred consideration of these claims so that it could consider whether evidence presented at the evidentiary hearing would have an impact on the issue of prejudice. The Court now finds it agrees with the California Supreme Court that the evidence had no impact on the proceedings in light of the other properly admitted evidence regarding Pinholster's assaultive past. The claims are DENIED.

D. Claim 72

In a reserved claim, Pinholster asserts the cumulative errors that occurred during the penalty phase entitle him to relief. Because the Court has found that, with the exception of Claim 58, the other penalty phase claims lack merit, the cumulative error claim is DENIED.

E. Claim 73

In another reserved claim, Pinholster asserts the "failures and errors" of his attorneys "during all phases of the trial were so profound and pervasive that they resulted in a breakdown of the adversarial process." Because the Court has found that, with the exception of Claim 58, the other claims in the petition lack merit, this claim is DENIED.

III. DISPOSITION

The compulsion of the Ninth Circuit authorities seems clear in this case. Based on the error established under Claim 58, counsel's ineffective assistance for failure to investigate and present mitigating evidence during the penalty phase, the petition for writ of habeas corpus is GRANTED as to Pinholster's death sentence. The petition is DENIED as to the remainder of the guilt and penalty phase claims. A writ of habeas corpus shall issue commanding the State of California to VACATE and SET ASIDE the sentence of death unless, within 90 days of the entry of judgment herein, the State of California grants Pinholster a new trial regarding sentencing. If the State does not elect to retry Pinholster as to sentencing, the

Superior Court shall VACATE his sentence of death and resentence him in accordance with applicable California law and the United States Constitution.

IT IS SO ORDERED.

Dated: March 24, 2003.

[Signature]
GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE

APPENDIX F

SUPREME COURT
FILED
OCT 1 1997
Robert Wandruff Clerk
DEPUTY

IN THE SUPREME COURT OF CALIFORNIA

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IN RE SCOTT LYNN PINHOLSTER

ON

HABEAS CORPUS

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The petition for writ of habeas corpus is denied on the substantive ground that it is without merit. Separately and independently, the first, second, third, fifth, and sixth claims are each denied on the procedural ground (see *Harris* v. *Reed* (1989) 489 U.S. 255, 264, fn. 10) that it is untimely, without justification or excuse and outside any exception, including that for a fundamental miscarriage of justice (see generally *In re Clark* (1993) 5 Cal.4th 750, 763-799): it was not presented within a reasonable time after its legal and factual bases were, or should have been, discovered (see *id.* at pp. 784-785). Separately and independently, the first, second, third, and fifth claims, and the sixth claim as

to review on appeal, are each denied on the procedural ground (see *Harris* v. *Reed, supra,* 489 U.S. at p. 264, fn. 10) that it is successive, without justification or excuse and outside any exception, including that for a fundamental miscarriage of justice (see generally *In re Clark, supra,* 5 Cal.4th at pp, 763-799): it was raised, and rejected, in the first petition for writ of habeas corpus, at least in part, and/or it could have been, but was not, raised in the first petition for writ of habeas corpus, at least in part (see *id.* at pp. 767-768).

Mosk, J., and Brown, J., would deny the petition solely on the merits.

[GEORGE]
Chief Justice

APPENDIX G

SUPREME COURT
FILED
JUL 19 1995
Robert Wandruff Clerk
DEPUTY

No. S034501

IN THE SUPREME COURT OF CALIFORNIA

IN RE SCOTT LYNN PINHOLSTER ON HABEAS CORPUS

The order to show cause is vacated as improvidently issued.

The petition for writ of habeas corpus is denied on the substantive ground that it is without merit. Separately and independently, claim G therein is denied on the following procedural grounds (See Harris v. Reed (1989) 489 U.S. 255, 264, fn. 10): in part, it could have been, but was not, raised on appeal (see, e.g., In re Dixon (1953) 41 Cal.2d 756, 759), without justification or excuse and outside any exception; in part it was raised and rejected on appeal (see, e.g., In re Waltreus (1965) 62 Cal .2d 218, 225), without justification or excuse and outside any exception. Separately and independently, claim P

therein is denied on the procedural ground (see Harris v. Reed, supra, 489 U.S. at p. 264, fn. 10) that it is untimely, without justification or excuse and outside any except ion. (See generally, In re Clark (1993) 5 Cal.4th 750, 763-799.) Separately and independently, claim NN is denied on the procedural ground (See Harris v. Reed, supra, 489 U.S. at p 264, fn 10) that it could have been, but was not, raised on appeal (see, e.g., In re Dixon, supra, 41 Cal .2d at p. 759), without justification or excuse and outside any exception.

Mosk , J. would deny the petition solely on the merits.

Lucas
Chief Justice

Mosk
Associate Justice

Kennard
Associate Justice

George
Associate Justice

Werdegar
Associate Justice

APPENDIX II

1 Cal.4th 865
4 Cal.Rptr.2d 765

The People, Plaintiff and Respondent,

v.

Scott Lynn Pinsholster, Defendant and Appellant.

No. S004616, CR23781.

SUPREME COURT OF CALIFORNIA, IN BANK.

February 20, 1992

William B. Chapman, under appointment by the Supreme Court, Rogers, Joseph, O'Donnell & Quinn, Mark A. White, Kyra A. Subbotin and Connie M. Teevan, San Francisco, for defendant and appellant.

John K. Van de Kamp and Daniel E. Lungren, Attys. Gen., Richard B. Iglehart and George Williamson, Chief Asst. Attys. Gen., Edward T. Fogel and Carol Wendelin Pollack, Asst. Attys. Gen., Thomas L. Willhite, Jr., William T. Harter and Kristofer Jorstad, Deputy Attys. Gen., for plaintiff and respondent.

MOSK, Justice.

Defendant Scott Lynn Pinholster was

convicted by a jury of first degree murder (Pen.Code, § 187)[1] of Thomas Johnson and Robert Beckett. The jury found true two multiple-murder special-circumstance allegations (§ 190.2, subd. (a)(3)) and allegations that each murder was committed during the perpetration of a robbery and a burglary. (§ 190.2, subd. (a)(17)(i), (vii).) The jury also found as to each count that defendant personally used a knife. (§ 12022, subd. (b).) The jury returned the same verdicts and findings against codefendant Paul David Brown. In addition, the jury convicted defendant of burglary of the residence of Michael Kumar (§ 459), robbery of Johnson and Beckett (§ 211), with intentional infliction of great bodily injury and personal use of a knife (§§ 12022.7, 12022, subd. (b)). Defendant was convicted separately of the robbery of Todd Croutch (§ 211), and the jury found true an allegation that he was armed with a firearm (§ 12022, subd. (a)).

The jury fixed the penalty at death.[2] This appeal is automatic. We conclude that one multiple-murder special circumstance should be set aside, and the judgment otherwise is affirmed.

I. FACTS

A. *Guilt Phase*

1. Prosecution Case

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[1] All further statutory references are to the Penal Code unless otherwise noted.

[2] The People did not seek the death penalty against codefendant Brown.

In May 1981, defendant and another man robbed the Encino home of drug dealer Todd Croutch at gunpoint. Todd's parents and brothers were forced to lie on the living room floor while defendant demanded Todd's drugs and money, holding a cocked pistol to his head. Defendant threatened to kill Mrs. Croutch. During an ensuing search of defendant's residence, credit cards belonging to the Croutches were seized. Todd Croutch received a threatening phone call a month after the robbery. Todd believed the caller was defendant, and reported that defendant said he would kill Todd and his family if he testified. Defendant admitted committing the robbery.

In mid-December 1981, according to the testimony of Charles Kempf, defendant suggested to Kempf and three others that they rob Michael Kumar, a drug dealer who lived in Tarzana, and someone defendant considered "an easy mark." Once at the Kumar home, Kempf walked to the rear and formed the impression that no one was home. The would-be robbers waited, preferring to accost Kumar and force him to admit them rather than break in. Defendant said, holding a buck knife in his hand, that he would get the drugs out of Kumar "one way or the other." Kempf also reported that defendant bragged that he had stabbed someone in the rectum during another robbery. Kempf and another cohort, Richard Crane, backed out of the plan and the men drove off. Kempf had previously been convicted of receiving stolen property and was under arrest when he first told the authorities of these events. He asserted that he had received no promise of leniency or other benefits in return for his testimony.

In the early morning hours of January 9, 1982, Thomas Johnson and Robert Beckett were stabbed to death as they returned to the home of Michael Kumar in Tarzana, where they were housesitting.

Defendant's accomplice, Art Corona, testified that defendant, with whom he was acquainted, and he were at a social gathering in defendant's Van Nuys apartment complex on the evening of January 8, 1982. Defendant solicited his participation in what was to be a robbery of Kumar. Defendant anticipated forcing entry into Kumar's home and taking marijuana, cocaine and money. Corona agreed and, using his own car, drove defendant and codefendant Brown toward Kumar's home. Defendant directed Corona to stop at the home of a woman who would help them gain entry to Kumar's home. At the woman's home, defendant went to the door but was refused entry twice. Defendant, who wore a buck knife in a leather sheath on his belt, as did the two other men, then stuck his knife through the door and scratched the hood of a nearby car with his knife.

Corona's testimony regarding this incident was corroborated by Lisa Tapar, her father, and another witness. Ms. Tapar was acquainted with both defendant and Kumar, and had the impression defendant planned to steal from Kumar. She reported that defendant arrived at her home between 12:30 and 2 a.m. on January 9, 1982, that she refused him entry, that he stabbed the front door with a knife, and then apparently inscribed her car with a swastika and lightning bolts.

Corona testified that on their arrival at the Kumar home, defendant knocked on the front door,

then forcibly opened a side gate and broke a window at the rear of the home. Finding the back door could not be opened without a key, codefendant Brown found an open sliding glass door and they entered. They ransacked the house. Corona helped to stack stereo equipment in the living room. Defendant took a small amount of marijuana from a bedroom, and spilled a green substance in the kitchen. They heard a car arrive and saw two people approach. One opened the door and exclaimed that the police should be called. The burglars decided to leave, and Corona led the way to the sliding glass doors. The two victims, Johnson and Beckett, then came around the back. When Johnson tried to enter the house, defendant came around Corona and struck Johnson in the chest three or four times. Defendant backed him out of the house and onto the patio, demanding drugs and money and repeatedly striking him. Johnson dropped his wallet on the ground and obeyed defendant's order to sit. Then Beckett approached, and defendant attacked him. Corona saw that defendant was stabbing Beckett, striking him in the chest as Corona had seen defendant strike Johnson. Defendant repeatedly stabbed Beckett, again demanding money and drugs. Defendant picked up Johnson's wallet and took a wallet from Beckett's pocket. Defendant repeatedly kicked Beckett in the head. Corona then saw codefendant Brown stabbing Johnson in the chest. The three men withdrew, and Corona drove them back to defendant's apartment. Brown and defendant commented that they had "gotten them good," and Brown said he had "buried his knife to the hilt" in Johnson.

On their arrival at defendant's apartment,

defendant washed his knife. Corona's wife Casey was present. A woman named Debbie arrived and cleaned Brown's knife. Defendant split the proceeds of the robbery: $23 and a quarter-ounce of marijuana. Corona and his wife took Brown to a motel on Sepulveda Boulevard.

The next day defendant called Corona and directed him to "lie low." Two weeks later, Casey told Corona that the police were looking for him. Having talked to his brother Caesar, and Casey's mother and sister, Corona turned himself in. At the station, he waived his rights and gave a statement basically consistent with his trial testimony, except that he did not mention that he had seen Brown stab Johnson, and he did not mention taking his share of the loot when it was divided.

Casey Corona corroborated her husband's testimony about embarking on the robbery, and his testimony regarding returning to defendant's apartment and washing the knives and splitting the proceeds. She observed what appeared to be blood washing off defendant's knife. She heard defendant say: "It had to be done the way it was done. We had to do what we had to do." Art Corona later commented in Casey Corona's hearing that defendant had "gone crazy." Casey Corona had recently been arrested on a drug charge and had received some assistance from the prosecutor in entering a diversion program.

Before the preliminary hearing, according to Corona, defendant was on the county jail bus to court with Corona, and threatened to kill him if he, Corona, testified against defendant. Defendant

advised Corona to assert his privilege against self-incrimination or face being blown up on his way to court. Defendant threatened Corona on several subsequent occasions.

Corona's credibility was impeached with his prior burglary conviction and his admission that he was a professional burglar who occasionally used heroin. He was to plead guilty to burglary and a violation of section 32 at the conclusion of the trial.

Physical evidence confirmed that defendant had been present in the Kumar house after it was ransacked. His palm print, smudged with green plant food, was found in one of the bedrooms. The owner stated that to his knowledge, defendant had never been in his house. Corona testified that defendant was wearing jeans and boots during the crime. In a search of defendant's apartment, police found boots that could have made a print in a pool of blood at the scene of the murders. The boots showed microscopic traces of human blood, as did a towel found in the apartment. A pair of jeans had a bloodstain on them as well, but having been washed, they were not tested to determine if the blood was human. Codefendant Brown was arrested in possession of a buck knife with dimensions that corresponded to one of the stab wounds inflicted on Thomas Johnson. Near the hilt of the knife criminalists discovered traces of human blood. There were no traces of blood on Art Corona's buck knife, but there was human blood on the inside forearm of the sleeve of a shirt seized from Art Corona.

Police witnesses testified that the ransacking at the scene looked like a "drug *ripoff*" in its

thoroughness, and that it would have taken one man an hour to do it all. They said that a window pane in the kitchen door had been removed, but that the door was deadbolted. The sliding glass doors at the rear of the house were open. Johnson's body was lying on the patio and Beckett's body was lying face down outside in an area of grass and gravel, in a pool of blood in which there was a large boot print. A county medical examiner was of the opinion that the two men had died between midnight and 3 a.m. on January 9, 1982. Beckett had received one fatal stab wound to the chest, while Johnson had received two fatal stab wounds, one 2.5 inches deep and one 4.5 inches deep. He had also been stabbed in the back. It appeared the fatal wounds were inflicted while Johnson was sitting or crouching. Beckett had also been stabbed in the right leg and hip, and suffered several abrasions including a large one in the back of the head, consistent with a kick.

2. Defense Case: Brown

Codefendant Brown testified that he had attended a party on January 8, 1982, at defendant's apartment building and got so drunk he could remember nothing, except that he was driven home around 10 or 11 p.m. and remained there with his girlfriend Wendy for the rest of the night. He knew nothing about the events at the Kumar home. His account of the evening was corroborated by his friend John Granara, who attended the party and testified that he drove Brown home about 10:30 or 10:45 p.m.

Brown's stepfather testified that he had cut himself on the knife found in Brown's possession.

County jail inmate Maxwell testified that Art Corona told him that Corona had done the double murder by himself, that he had stabbed one victim, and then ran to the other and stabbed him so that neither could escape.

Pathologist John Ryan testified that in his opinion, Johnson was not supine when stabbed, but was erect, standing near the door of the patio. The doctor opined that Johnson walked several feet, and then collapsed onto his right side.

3. Defense Case: Defendant

Defendant admitted the Croutch robbery. He asserted that he was a professional robber, but not a murderer. He said he had committed hundreds of robberies over the preceding six-year period. He used a gun, not a knife, and victimized drug dealers. He admitted a prior kidnapping conviction, but said that he had admitted the use of a knife only as a result of a plea bargain, not because it was true.

He had planned to rob Kumar, but he denied the abortive robbery attempt recounted by prosecution witness Kempf. Defendant said it was Kempf who suggested the robbery, but as Kempf had testified against another associate, defendant wanted nothing to do with Kempf.

On the evening of January 8, 1981, defendant threw a party in honor of his best friend, "Shotgun," whose funeral had been two days before. Around 8 p.m., defendant left to get drugs from Kumar's house to liven up the party. He knocked on Kumar's door and, hearing no response, went to the back and broke

a pane in the kitchen door. It would not open, but another door swung open when he kicked it. He took a bag containing about half a pound of marijuana from a bedroom. He touched a bag containing a bluish substance in the bedroom, and spilled a bag containing green material in the kitchen. He did not ransack the house or stack the stereo equipment. He did not kill anyone.

He returned to the party a little before 9 p.m., and shared the marijuana he had taken. He drank heavily and smoked considerable marijuana. Art Corona wanted to know where he had gotten the marijuana. Around 11:30 p.m., because Corona complained that he was short of cash, defendant gave him Kumar's address in exchange for a third of whatever Corona could steal from him. Corona returned around 1 a.m., having been unable to find Kumar's house. Defendant gave him directions again. About 1:30 a.m. defendant went out for food, then went to tell Lisa Tapar that "Shotgun" was dead. When she slammed the door in his face, he stabbed the door and scratched a swastika and lightning bolt on her car. He returned home a little after 2 a.m. Art Corona arrived around 4 a.m., reporting he had gotten nothing from Kumar's home. The next morning, Corona called to ask defendant not to say anything about his trip the night before. Defendant told Corona about his own visit to Lisa Tapar.

Defendant's brother and several friends testified in defendant's behalf, confirming in basic outline his testimony regarding the party in his apartment building, the timing of his various absences, and his distribution of marijuana he provided around 9 p.m.

Defendant called Gian Norelli, who said he was present when Charles Kempf tried to get defendant to participate in a robbery of Kumar. He denied that the group of men actually went to Kumar's home, and he said that Kempf had a reputation as a liar. He was impeached with his prior inconsistent statement to the police, relating the earlier abortive attempt on the Kumar home in terms substantially the same as Kempf's testimony.

One Gary Mallory said Casey Corona had approached him near her home, asking what would happen if she were caught lying for her husband on the witness stand.

Terry Pinholster testified that the bloodstained boots found in defendant's apartment were his. Defendant testified that the boots were too small for him.

4. Rebuttal

Lisa Tapar denied that defendant had come to her home on January 9, 1982, in his own car, with which she was familiar. Rather, she saw Art Corona's station wagon nearby when defendant visited her. She was not acquainted with "Shotgun."

Michael Kumar denied keeping any marijuana in his bedroom. He said he kept it all in his safe. A large quantity of marijuana was seized from this safe.

Eric Klemetti testified that he had arranged a marijuana transaction with victim Johnson by

telephone around 8 p.m. on January 8, 1982. When he arrived at the Kumar house about 9 p.m., Johnson was there and everything was in order. He saw no broken windows or spills in the kitchen.

A news article defendant claimed he saw on January 9, 1982, was actually not published until January 10, 1982, though the investigating officer mistakenly marked it with the earlier date. This copy was furnished to defendant during discovery, and defendant had access to the file while he represented himself.

Detective Quartararo reported that Gian Norelli had admitted going to Kumar's home with defendant and Crane to commit a robbery that never "panned out." The detective also said Norelli told him that Norelli had overheard defendant tell one of the Crane brothers that he, defendant, had stabbed two people in Tarzana. Quartararo said Norelli told him defendant had asked Norelli to lie for him while the two were in county jail. Norelli claimed he just wanted to get everything off his chest before he went to prison.

Detective Stoughton cast doubt on the testimony of Brown's girlfriend Wendy that Brown had returned to her on the night of January 8, 1982. When Stoughton interviewed her on January 26, 1982, she had said she waited for Brown on the night of January 8, 1982, that he finally came home between 3 and 4 a.m., that they argued heatedly, and that he left. She did not say at that time, as she did at trial, that Brown returned at 10 p.m. and fell into bed dead-drunk.

B. *Penalty Phase*

1. Prosecution Case

Defendant stipulated that he had suffered a prior conviction for kidnapping, with use of a knife. He conceded that there was no plea bargain with respect to the use allegation, and that he was identified as having held the knife to the victim's throat. Defendant stipulated that he had committed numerous disciplinary infractions during his prison term, for such behavior as throwing liquids at guards, and threatening to stab guards and throw them off the tier. He was classified and housed as a disciplinary problem and was subjected to a low calorie diet, a measure reserved for the most recalcitrant inmates.

Los Angeles County Probation Officer Taube testified that defendant, as a juvenile, had been in court for a hearing on a probation violation involving violation of curfew when he gave vent to a violent outburst, threatening everyone in court, and actually striking the bailiff. It took several officers to subdue him and escort him from the courtroom. Taube said defendant had been difficult to supervise because of gang activities. Defense counsel elected to pursue this on cross-examination, asking if defendant's gang activities had not subsided, and Taube said that they had not, and that defendant had been quite well known in the juvenile gang community at the time.

Los Angeles Police Officer Kaufman testified that when he was called to intervene in a fight involving a knife, defendant was combative with the police, faked an epileptic seizure, had to be

restrained, threatened to kick the police officers from the back of the patrol car, and ultimately kicked him in the head. On cross-examination it appeared that there was little or no evidence of any knife fight, that the officer had little training regarding epilepsy, and that before the violent outburst, both officers had maced defendant in the face for trying to leave the scene.

Los Angeles Police Officer Guzman testified that he had arrested defendant, who first resisted, then dropped to the ground in a spasmatic attack. During transport, defendant tried to kick him in the head and kicked his partner in the legs. They had to stop the car to restrain defendant, who issued continual threats to be revenged once he was released. Defendant complained that the restraint had injured his legs, and when he was taken to the hospital for X-rays, he spat on the police and kicked the X-ray machine.

Deputy Sheriff Loper testified that during custody pending trial, defendant had started a racial fight in the jail law library, that defendant had kneed the officer in the groin while the officer tried to restrain him, that it ultimately required four deputies to restrain defendant, and that defendant had admitted threatening Black inmates.

Deputy Sheriff Piggott testified that defendant was housed in the disciplinary module in the county jail because of assaults on other inmates and staff, and that his record showed 11 or 12 incidents of violence or threats of future violence. He had a fight with an inmate over a card game, on another occasion he struck an inmate in the head and ribs, he

routinely threw urine at guards, he threatened to get a knife to kill a deputy and threatened to have friends on the outside kill another deputy, he was involved in a fight at the law library, and he assaulted an inmate in the lockup. In addition to the attack on Deputy Loper, he threw food and urine in the face of another deputy, attempted to kick a deputy who was transporting him, again threw urine in the face of a deputy, and struck two deputies in the ensuing melee. Defendant had said that he wanted to go to prison, and that if he were not sent to prison, he would do something to get there.

On cross-examination, the officer said defendant was full of empty boasts and threats. On redirect, he testified that defendant's record showed 27 incidents of violation of jail rules. Deputy Barrett testified that defendant told him that he thought he would get out of jail soon, and that when he got out he would have to kill Art Corona because he was so mad at him.

One Theodore Mesquita testified that he had gone looking for defendant to settle a matter of honor "man to man." It seems that defendant returned Mesquita's punches with a blow to the arm with a knife or razor, and that defendant pursued Mesquita on foot all the way to the hospital, where the wound was sewed up with 50 stitches. Finally, defendant's wife Cathy Smith testified that defendant had once struck her and had broken her jaw. On cross-examination she said that the attack occurred during one of defendant's epileptic seizures. On redirect she admitted telling the prosecutor that defendant faked seizures.

2. Defense Case

Defendant called his mother, who said that while he had not suffered economic deprivation as a child, he had had a poor relationship with his stepfather, whose discipline of the boy bordered on abuse. Defendant had two head injuries as a child. When he was two, his mother ran over him with her car, injuring his head and tearing off an ear. When he was four or five, they were in a car accident in which defendant's head went through the windshield. Defendant was disruptive in school, but did better in a class for the educationally handicapped. A psychologist recommended defendant be committed to a mental hospital when he was 10, but his mother refused. He was committed to Camarillo State Hospital at age 12 as an emotionally handicapped child. Defendant fancied himself a neighborhood Robin Hood, and stole things and distributed them to the neighborhood children. He spent much of his youth in boys' homes, juvenile hall, and juvenile camps. When defendant was in the county jail at age 18, he was beaten severely and has had epilepsy ever since.

Defendant was always well behaved at home, but commented that he could not bring his gang friends home because the comfortable home would ruin his image. Defendant lived with his mother after his release from state prison, and he would shut himself in his room for long periods of time. He said that after his time in prison, he did not know how to open doors very well.

II. DISCUSSION

A. *Jury Selection Issues*

1. Joint Peremptory Challenges

Defendant argues that the application to his trial of former sections 1070 and 1070.5 (see now Code Civ.Proc., § 231, subd. (a)) violated his state and federal constitutional rights to due process, equal protection, an impartial jury, and a reliable determination of penalty. These statutory provisions allotted to each defendant 5 separate peremptory challenges and 26 peremptory challenges to exercise jointly with his codefendant, but allotted to the prosecution 36 unrestricted challenges. Respondent claims that defendant's motion raising this issue in the trial court was premature, and that in any case there was no possibility of prejudice because defendant did not exhaust his peremptory challenges or object to the jury as constituted. Even if the claim is properly before us, we reject it on the merits, as we have done before. (*People v. Webster* (1991) 54 Cal.3d 411, 439, 285 Cal.Rptr. 31, 814 P.2d 1273; *People v. Johnson* (1989) 47 Cal.3d 1194, 1222-1223, 255 Cal.Rptr. 569, 767 P.2d 1047; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1004-1007, 248 Cal.Rptr. 568, 755 P.2d 1017.) We decline to reopen the question.

2. Peremptory Challenge of Jurors With Reservations About the Death Penalty

Defendant argues that the prosecutor's use of peremptory challenges to exclude prospective jurors with reservations about the death penalty deprived him of his rights under the Sixth, Eighth and

Fourteenth Amendments to the United States Constitution to a fundamentally fair and reliable determination of penalty by a jury that fairly represented the community. Respondent claims any error was waived by failure to object below, while defendant claims we must assume that the objection was made at unreported bench conferences. Even assuming that defendant is correct on the procedural point, we have rejected his argument consistently on the merits. (*People v. Turner* (1984) 37 Cal.3d 302, 315, 208 Cal.Rptr. 196, 690 P.2d 669, overruled on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, 240 Cal.Rptr. 585, 742 P.2d 1306; see also *People v. Gordon* (1990) 50 Cal.3d 1223, 1263, 270 Cal.Rptr. 451, 792 P.2d 251; *People v. Adcox* (1988) 47 Cal.3d 207, 249, 253 Cal.Rptr. 55, 763 P.2d 906.)[3] Similarly, we have consistently rejected the argument defendant raises in a footnote "for preservation," that excusal for cause of jurors whose opposition to the death penalty would interfere with their ability to follow the instructions at the penalty phase denied him a fair and representative jury on the issue of guilt, in violation of his Fifth, Sixth and Fourteenth Amendment rights. (See, e.g., *People v. Pensinger* (1991) 52 Cal.3d 1210, 1254, 278 Cal.Rptr. 640, 805 P.2d 899; *People v. Thompson* (1990) 50 Cal.3d 134, 157, 266 Cal.Rptr. 309, 785 P.2d 857,

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[3] Appellant's citation to *Brown v. Rice* (W.D.N.C.1988) 693 F.Supp. 381, 393, in support of his position is unavailing; as he forthrightly notes, the district court's decision was reversed on this issue. (*Brown v. Dixon* (4th Cir.1989) 891 F.2d 490, 496-498, cert. den. 495 U.S. 953, 110 S.Ct. 2220, 109 L.Ed.2d 545.) We agree with the Fourth Circuit. (*People v. Edwards* (1991) 54 Cal.3d 787, 831, 1 Cal.Rptr.2d 696, 819 P.2d 436.)

relying on *Lockhart v. McCree* (1986) 476 U.S. 162, 174-176, 106 S.Ct. 1758, 1765-1766, 90 L.Ed.2d 137.)

3. Hypothetical Questions

a. *Peremptory Challenges*

Defendant argues that his state and federal constitutional rights to an impartial jury and a fair and reliable determination of penalty were violated by the prosecutor's use in voir dire of hypothetical questions designed to aid her in exercising peremptory challenges. He claims these questions during the sequestered portion of voir dire impermissibly allowed her to exclude eight jurors who were not so opposed to the death penalty that they could not follow the instructions, but who might not have voted for the death penalty under the particular facts of this case. He maintains that by using these questions, the prosecutor obtained a "hanging jury" in violation of *Witherspoon v. Illinois* (1968) 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (*Witherspoon*), *People v. Fields* (1983) 35 Cal.3d 329, 197 Cal.Rptr. 803, 673 P.2d 680, and *People v. Wheeler* (1978) 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (*Wheeler*). The trial court permitted such questions over defense objection, relying on our then-recent decision in *People v. Fields, supra,* 35 Cal.3d 329, 197 Cal.Rptr. 803, 673 P.2d 680.

As we have seen, however, we have made it clear that those with scruples about imposing the death penalty are not a cognizable class, the exclusion of which violates defendant's right to a representative jury under *Wheeler, supra,* 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748.(*People v.*

Turner, supra, 37 Cal.3d at pp. 313-315, 208 Cal.Rptr. 196, 690 P.2d 669.) In addition, we have rejected the claim that to permit peremptory challenge of prospective jurors with scruples about the death penalty is to produce a jury biased in favor of death under *Witherspoon, supra,* 391 U.S. at pages 520 to 521, 88 S.Ct. at page 1776, because both parties are allowed a limited number of challenges " 'against jurors harboring specific attitudes they reasonably believe unfavorable.' " (*People v. Gordon, supra,* 50 Cal.3d at p. 1263, 270 Cal.Rptr. 451, 792 P.2d 251, quoting *People v. Turner, supra,* 37 Cal.3d at p. 315, 208 Cal.Rptr. 196, 690 P.2d 669; see also *People v. Carrera* (1989) 49 Cal.3d 291, 331, 261 Cal.Rptr. 348, 777 P.2d 121, and cases cited.)

Once it is established that the prosecutor's aim was permissible, in that she was permitted to exercise peremptory challenges against those prospective jurors she suspected would be unfavorable to her case, the questions permitted to achieve that aim become a matter of the trial court's "considerable discretion." (*People v. Williams* (1981) 29 Cal.3d 392, 408, 174 Cal.Rptr. 317, 628 P.2d 869.) We did say in *People v. Williams, supra,* 29 Cal.3d at page 408, 174 Cal.Rptr. 317, 628 P.2d 869, that "a question fairly phrased and legitimately directed at obtaining knowledge for the intelligent exercise of peremptory challenges may not be excluded merely because of its additional tendency to indoctrinate or educate the jury." (*Ibid.*) Many of the questions asked by the prosecutor were designed to determine prospective jurors' views regarding the legal doctrines involved in the case, including the felony-murder rule, a legitimate area of inquiry. We also note that in several instances, it was defense counsel

who asked the hypothetical questions that allowed the prosecutor to exercise her peremptory challenge. While we have cautioned that such questions may improperly educate the jury on the facts and tend to compel jurors to commit themselves to a particular outcome (*People v. Mason* (1991) 52 Cal.3d 909, 940, 277 Cal.Rptr. 166, 802 P.2d 950; see also *People v. Wright* (1990) 52 Cal.3d 367, 419, fn. 18, 276 Cal.Rptr. 731, 802 P.2d 221), we see no prejudicial abuse of discretion in permitting the questions asked here.

In his reply brief, defendant seems to abandon his earlier reliance upon *Wheeler*, *supra*, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748, and *Witherspoon*, *supra*, 391 U.S. 510, 88 S.Ct. 1770. Instead, he argues that the questioning violated his right to a fair and representative jury under the Sixth and Fourteenth Amendments to the United States Constitution "not because these eight jurors formed some cognizable group within the community-but instead because each had been improperly compelled to prejudge the merits of imposing the death penalty under the 'hypothetical' circumstances of this particular case and were then excluded by prosecution peremptory based on those prejudgments." This is unpersuasive. If the excluded jurors had prejudged the case in favor of the prosecution on the basis of the voir dire questioning, defendant presumably would not want them either. If defendant is saying he is constitutionally entitled to retain on his jury prospective jurors who have prejudged *against* the death penalty, he again fails to persuade. As we have seen, the prosecutor is entitled to exercise a certain number of peremptory challenges simply on a suspicion that the juror will

be unfavorable to his or her cause, and this is considered not to impair defendant's right to an impartial jury, because the defense has the same right. (*People v. Turner*, *supra*, 37 Cal.3d at p. 315, 208 Cal.Rptr. 196, 690 P.2d 669.) Accordingly, defendant can hardly claim the constitutional right to retain jurors who might view the facts favorably to him at the penalty phase.

b. *Effect on Jury*

In a related argument, defendant argues that the prosecutor's "pervasive" use of the facts of the case during death-qualifying voir dire permitted eight of the jurors actually selected to prejudge the facts, in violation of defendant's constitutional rights to an unbiased jury, due process of law, and a reliable determination of penalty under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16 and 17 of the California Constitution. He claims this error requires reversal of both the guilt and penalty verdicts.

Defendant complains that in her hypothetical questions, the prosecutor imputed specific intent to kill to defendant, and introduced as facts that defendant had no mental defect or diminished capacity, and that defendant had stabbed both victims. He quotes such questions as: "If you were to learn, or have a fact situation, this is purely a hypothetical, where two people set out to commit a burglary, and while they are inside a residence committing a burglary-by the way no one is at home so they do break into a residence-while they are inside the home, the owner of the residence and a

friend return to the home, and burglars kill them to avoid detection or avoid the police being called. [¶] Can you envision imposing the death penalty on either one of the burglars in that particular fact situation?"

As we have seen, the scope of questions to be asked at voir dire is a matter for the trial court's discretion. "Under *Williams* [*supra,* 29 Cal.3d 392, 174 Cal.Rptr. 317, 628 P.2d 869] the court must permit questioning about legal doctrines that are material to the trial and controversial in the sense that they are likely to invoke strong feelings and resistance to their application." (*People v. Johnson, supra,* 47 Cal.3d at pp. 1224-1225, 255 Cal.Rptr. 569, 767 P.2d 1047.) Certainly, we have cautioned that the trial court may limit voir dire couched in terms of the facts expected to be proved, in order to avoid the danger of indoctrinating the jury on a particular view of the facts. (*People v. Mason, supra,* 52 Cal.3d at p. 940, 277 Cal.Rptr. 166, 802 P.2d 950.) We have also commented that the death qualifying voir dire should focus on juror attitudes toward the death penalty in the abstract, and should not be used to seek a prejudgment of the facts to be presented at the trial. (*People v. Clark* (1990) 50 Cal.3d 583, 597, 268 Cal.Rptr. 399, 789 P.2d 127.)

Having examined the record, we think that for the most part, the prosecutor's questions were aimed at exploring the jurors' views regarding legal doctrines and the death penalty in the abstract. The question quoted above, and others like it, seem to us to be directed primarily at determining the jurors' attitudes toward the felony-murder special circumstance. To the extent that the court allowed

questions laden with too many examples of facts to be proved at trial, we find no reasonable possibility that any error in permitting these questions prejudiced defendant at the penalty phase of trial, nor do we see any reasonable probability that such questions prejudiced defendant at the guilt phase of trial. (See *People v. Balderas* (1985) 41 Cal.3d 144, 190 and fn. 19, 222 Cal.Rptr. 184, 711 P.2d 480.)

First, in the face of hypothetical questions framed in terms of the general facts of this case, the jurors sturdily refused to be drawn into prejudging the case. They repeatedly said that they could not say how they would vote, and that they needed more facts or instruction in the law. Two who hazarded some response to the hypotheticals were noncommittal: Jurors Docken and Mackey. Two remaining jurors were asked only a single question using facts expected to be proved at trial, in the context of ascertaining their views regarding imposing the death penalty for a felony murder: Jurors Goodnight and Mitchell. Much of the questioning came from defense counsel, who presumably could phrase the questions to avoid leading the jury to prejudge the case in favor of the prosecution.[4]

Second, because these questions occurred during the sequestered portion of voir dire, the jurors

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[4] That defense counsel participated in the questioning would not seem to bar defendant from complaining on appeal, because counsel indulged in these questions only after the trial court denied defense motions to exclude hypothetical questioning based on the facts of the case.

only heard the questions once, and were not "bombarded with the ... questions and instructions directed at all the other panelmembers." (*People v. Balderas, supra,* 41 Cal.3d at p. 190, 222 Cal.Rptr. 184, 711 P.2d 480.) Further, the court instructed the jury before voir dire that the questions were merely hypothetical, and counsel and the court reiterated this during the course of voir dire. At the beginning of general voir dire, the court instructed the jurors that they were the sole judges of the facts and that they must consider only the evidence presented in court, and the court repeated these instructions at the conclusion of the guilt phase and again at the end of the penalty phase of trial.

Finally, defendant did not indicate dissatisfaction with the jury before it was sworn, and in fact, defendant still had two individual peremptory challenges and ten peremptory challenges to be exercised jointly with his codefendant when he accepted the jury. Defendant's unexplained failure to exhaust his peremptory challenges or express dissatisfaction with the jury as seated means that he cannot complain on appeal regarding the seating of these eight jurors. (*People v. Morris* (1991) 53 Cal.3d 152, 184, 279 Cal.Rptr. 720, 807 P.2d 949; *People v. Stankewitz* (1990) 51 Cal.3d 72, 103, 270 Cal.Rptr. 817, 793 P.2d 23; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1086-1087, 259 Cal.Rptr. 630, 774 P.2d 659.)

4. Witherspoon Witt Error

Defendant contends that prospective jurors Barsugli and Rohletter were improperly excused for cause on the motion of the prosecutor, in violation of the Sixth and Fourteenth Amendments to the United

States Constitution. Defendant argues that a juror may not be excused for cause if his or her unwillingness to vote for the death penalty in the particular case rests upon an evaluation of the evidence to be presented.

We find no error in the trial court's excusal of either juror. The record of their voir dire discloses that the trial court could properly find that they had views on capital punishment that would have prevented or substantially impaired the performance of their duties. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841(*Witt*).) In this case, substantial evidence supports the trial court's determination. (*People v. Cooper* (1991) 53 Cal.3d 771, 809, 281 Cal.Rptr. 90, 809 P.2d 865; *People v. Daniels* (1991) 52 Cal.3d 815, 875, 277 Cal.Rptr. 122, 802 P.2d 906; *People v. Gordon, supra,* 50 Cal.3d at p. 1262, 270 Cal.Rptr. 451, 792 P.2d 251.) Each juror's reluctance to impose the death penalty was based not on an evaluation of the particular facts of the case, but on an abstract inability to impose the death penalty in a felony-murder case.

Prospective juror Rohletter said that while he had no conscientious objection to the death penalty, he would have a "hard time" imposing it in a case involving a burglar who stabs an adult victim. He equivocated about his ability to follow the instructions and to impose the death penalty. At a lunch break, the juror reflected on his views, and came back with more sharply defined reluctance to impose the death penalty. He volunteered that: "I would find it very difficult to find a defendant guilty if the penalty would be death in a case such as this."

He said unequivocally, in response to the court's question, that he could not return a guilt verdict or the death penalty in a case in which the defendant killed two victims in the course of a burglary "because I feel that the degree is not that severe. It's severe, but it's not, in my opinion, severe enough that I would be able to take, or say that I could take somebody else's life." He then affirmed unequivocally that he could not return a death penalty in a burglary-murder case regardless of the aggravating circumstances. While he said he could "consider" the death penalty in a burglary-murder case, he explained that by "consider" he meant "listen to," "take into consideration what I'm being told." He immediately thereafter unequivocally affirmed that he could not under any circumstance impose the death penalty in such a case.

The people of the State of California have determined that burglary-murder is a category of crime for which a defendant may be subject to death, depending on the circumstances (§ 190.2, subd. (a)(17)(vii).) This prospective juror unequivocally stated his inability to follow the law in this respect. His position was an abstract one regarding the felony-murder special circumstance, not a matter of evaluating the particular facts of this case. Substantial evidence supports the implied determination of the trial court that this prospective juror was not impartial with respect to the imposition of the death penalty.

Prospective juror Barsugli, too, did not express a conscientious opposition to the death penalty in general, but did convey clearly that he could not vote for the death penalty in the case of a burglary-

murder where there was no preexisting intent to kill or torture, regardless of the evidence in aggravation. He concluded that he would never vote for the death penalty in a burglary-murder case unless the killing were in fact premeditated. The trial court's decision to excuse him for cause was supported by substantial evidence. (*People v. Cooper, supra,* 53 Cal.3d at p. 809, 281 Cal.Rptr. 90, 809 P.2d 865.)

Defendant objects that fact-based voir dire is impermissible under *Witt, supra,* 469 U.S. 412, 105 S.Ct. 844. As we have already noted, we have commented in the past that questions directed to jurors' attitudes towards the particular facts of the case are not relevant to the death qualification process, so that a trial court that refused to permit such questions did not err. (*People v. Clark, supra,* 50 Cal.3d at p. 597, 268 Cal.Rptr. 399, 789 P.2d 127.) We have also said, however, that "a court may properly excuse a prospective juror who would automatically vote against the death penalty in the case before him, regardless of his willingness to consider the death penalty in other cases." (*People v. Fields, supra,* 35 Cal.3d at pp. 357-358, 197 Cal.Rptr. 803, 673 P.2d 680.) It was this language upon which the trial court in this case relied in permitting certain questions regarding the prospective jurors' attitudes toward the facts of the case. Here, the questions provided a basis for deciding something about the juror's views in the abstract; not only was each of these two jurors asked his attitude toward a case phrased in terms of the facts of this case, but the answer to these questions led to the ultimate and crucial question whether the juror could vote for the death penalty in any burglary-murder case. This was not a case like *Clark, supra,* 50 Cal.3d at page 597,

268 Cal.Rptr. 399, 789 P.2d 127, where the questions about juror attitude toward evidence of the victims' burns were more appropriate to general voir dire. Rather, the questions regarding the facts of the particular case led to crucial questions and answers about the jurors' attitudes in the abstract.

Trial courts have broad discretion in determining what questions to permit. (*People v. Johnson, supra,* 47 Cal.3d at p. 1224, 255 Cal.Rptr. 569, 767 P.2d 1047.) We see no prejudicial error in allowing questions regarding the particular facts of the case as long as more relevant questions and answers provide the basis for the court's decision. Here, the trial court refused to excuse the prospective jurors for cause until there was a clear indication that their views about capital punishment in the abstract would substantially impair their ability to perform their duties, an appropriate exercise of discretion under *Witt, supra,* 469 U.S. 412, 105 S.Ct. 844.

5. Reference to Commutation Power

Defendant argues that the penalty verdict must be reversed because during sequestered voir dire of three jurors who remained on the jury, questions relating to the Governor's commutation power were asked, in violation of defendant's state and federal constitutional right to a fair and impartial jury. Putting aside the fact that it was defendant's counsel who introduced the subject in the case of two of the jurors, and putting aside defendant's failure to object to the jury as constituted or exhaust his peremptory challenges, we find no possibility of prejudice. Although we discourage

questions on this subject, as we have said before, when the commutation power is mentioned at voir dire, the jury's attention is not narrowly focused on its duty to select a penalty, and the potential for prejudice is slight. (*People v. Walker* (1988) 47 Cal.3d 605, 627, 253 Cal.Rptr. 863, 765 P.2d 70; *People v. Ghent* (1987) 43 Cal.3d 739, 769-770, 239 Cal.Rptr. 82, 739 P.2d 1250.) No "Briggs Instruction" regarding the Governor's commutation power was given and the court properly instructed the jury that questions of counsel are not evidence, and that the jury should be bound by the evidence presented at trial and the instructions of the court. We presume absent contrary indications that the jury was able to follow the court's instructions.

B. *Issues Affecting Both Guilt and Penalty Trials*

1. Failure to Report Sidebar Conferences

The trial court refused to order that every bench conference between the court and counsel be reported. Thus, 133 sidebar conferences were not reported. Defendant argues that the court's action violated his right to due process, to effective assistance of counsel, and to a fair and reliable review of the guilt and penalty determinations as guaranteed by article I, sections 7, 15, 16 and 17 of the California Constitution and by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. He also claims the court's ruling violated Code of Civil Procedure section 269 and Penal Code section 190.9.

Respondent counters that the law applicable to defendant's 1984 trial did not require the reporting of sidebar conferences, and maintains that in any case, there was no material omission in the record.

The record reflects that during the first day of testimony at the guilt phase of trial, counsel for codefendant Brown moved that all sidebar conferences be reported, complaining that he would forget any objection not recorded at sidebar. After several discussions of the point, the court ruled: "[I]t is the court's ruling that I will accept legal objections from counsel. I urge counsel not to make speaking objections, make the objections in legal terms. And when the court believes that any side bar conferences are appropriate, we will have side bar conferences. [¶] In lieu of that, we will not have side bar conferences. I have said that before. I allow them at the convenience and to aid the attorneys, but we are not going to take the reporter around every five minutes to set up a side bar conference during this trial." It is interesting to note that immediately thereafter, having reviewed the daily transcript from the day before, Brown's attorney was permitted to clarify an objection he felt was not fully reflected in the transcript. The matter was raised for the last time in the motions for new trial.

Defendant's claim that the court abused its discretion rests on Code of Civil Procedure section 269 and on Penal Code section 190.9. Code of Civil Procedure section 269 provided at the time of defendant's trial: "The official reporter ... must ... take down in shorthand all the testimony, the objections made, the rulings of the court, the exceptions taken, all arraignments, pleas, and

sentences of defendants in criminal cases, the arguments of the prosecuting attorney to the jury, and all statements made and oral instructions given by the judge...."[5] Effective in 1985, the year after defendant's trial, section 190.9 was added to the Penal Code, requiring that in a case in which a death sentence may be imposed "*all* proceedings conducted after the effective date of this section in the justice, municipal, and superior courts, *including proceedings in chambers*, shall be conducted on the record with a court reporter present." (Emphasis added.)[6] Defendant's claim that the section merely restated existing law is meritless; the express language making the statute prospective only belies the suggestion. In reaching this conclusion we rely also on the explanation of the Legislative Counsel accompanying the bill (Stats.1984, ch. 1422, § 2, p. 4994) that while existing law required the reporting of testimony and other *specified* statements, this section would require that *all* proceedings be conducted on the record, thereby imposing new costs on local government.

[5] The section since has been amended, but the amendments were essentially editorial as to this portion of the section.

[6] Defendant claims that "[i]t is well-established that section 190.9, like the preexisting statutory and case law requiring transcripts is mandatory; and even apparently trivial violations of section 190.9 may implicate due process rights." For this proposition he cites a case we ordered depublished a year before defendant filed his brief. We have been unable to discover any authority establishing that an insubstantial violation of section 190.9 or Code of Civil Procedure section 269 would implicate due process rights.

Although sidebar and chambers discussions have long been a permissible part of the record on appeal (see *Lipka v. Lipka* (1963) 60 Cal.2d 472, 480-481, 35 Cal.Rptr. 71, 386 P.2d 671 [equivalent of settled statement of chambers discussion proper part of record on appeal]; see also *People v. Holloway* (1990) 50 Cal.3d 1098, 1115-1116, 269 Cal.Rptr. 530, 790 P.2d 1327), we have found no case, nor has defendant cited any, requiring that in every instance they must be reported. Code of Civil Procedure section 269, whether in its current form or that applicable at the time of defendant's trial, is not explicit on the point.[7] However, we need not determine whether the trial court erred under Code of Civil Procedure section 269, since it is so patently clear that any abuse of discretion in refusing to order the sidebar conferences reported has not prejudiced defendant, and has not impeded his ability to seek meaningful appellate review.

As we said in a recent capital case in which defendant complained that five hours of chambers argument over a suppression motion was not reported: "Section 1181, subdivision 9 [of the Penal Code] authorizes a reviewing court to order a new trial 'because of the loss or destruction, in whole or in substantial part' of the reporter's notes. 'The test is whether in light of all the circumstances it appears that the lost portion is "substantial" in that it affects

[7] Defendant does not rely on rule 39.5(c) of the California Rules of Court, specifying the record to be prepared for an automatic appeal from a death judgment, and we agree with respondent that the rule does not purport to require the trial court to order sidebar discussions reported.

the ability of the reviewing court to conduct a meaningful review and the ability of the defendant to properly perfect his appeal.' " (*People v. Holloway, supra,* 50 Cal.3d at p. 1116, 269 Cal.Rptr. 530, 790 P.2d 1327, quoting *People v. Morales* (1979) 88 Cal.App.3d 259, 267, 151 Cal.Rptr. 619.) We concluded that a settled statement provided an adequate substitute for the missing transcript. (*People v. Holloway, supra,* 50 Cal.3d at p. 1116, 269 Cal.Rptr. 530, 790 P.2d 1327.)

This is obviously not a case like those defendant cites in which the record of the trial as a whole is missing or unavailable. (See, e.g., *People v. Jones* (1981) 125 Cal.App.3d 298, 178 Cal.Rptr. 44 [notes of whole trial destroyed]; *In re Ray O.* (1979) 97 Cal.App.3d 136, 138-139, 158 Cal.Rptr. 550 revd. on other grounds 213 Cal.App.3d 701, 708, 261 Cal.Rptr. 814 [no reporter's transcript of juvenile disposition hearing].) This is not a case in which a large or crucial portion of the record is missing (see, e.g., *In re Steven B.* (1979) 25 Cal.3d 1, 157 Cal.Rptr. 510, 598 P.2d 480 [stenographic notes for half of juvenile jurisdictional hearing destroyed]; *People v. Apalatequi* (1978) 82 Cal.App.3d 970, 973, 147 Cal.Rptr. 473 [reporter's notes of arguments of counsel lost; settled statement inadequate to raise prosecutorial misconduct argument]), or in which a crucial item of evidence is not available on appeal (compare *In re Roderick S.* (1981) 125 Cal.App.3d 48, 177 Cal.Rptr. 800 [loss of knife in possession of weapon case necessitates reversal] with *People v. Curry* (1985) 165 Cal.App.3d 349, 353-354, 211 Cal.Rptr. 590 [affirmance in face of loss of part of officer's probable cause statement to magistrate]). Rather, it is one in which only an inconsequential

portion of the proceedings was not transcribed and has not been reconstructed. (Compare, e.g., *People v. Moore* (1988) 201 Cal.App.3d 51, 56, 248 Cal.Rptr. 31 [omission of defense counsel's closing arguments inconsequential].)

We are convinced that no 'substantial' portion of the record is missing in this case. The record in this appeal consists of 56 volumes of reporter's transcripts, covering 7,557 pages, 4 volumes of clerk's transcripts, covering 1,208 pages, as well as augmented clerk's and reporter's transcripts of several volumes. We have before us the reporter's transcript of the preliminary hearing, of hearings on all the pretrial motions, of voir dire, of the opening and closing arguments of the prosecutor and both defense counsel, of the testimony of every witness, and of the trial court's every word to the jury, including, of course, jury instructions. We have all the parties' pleadings and written motions, as well as the reporter's transcript of the hearing on defendant's motion for new trial, the application for modification of sentence, and the formal sentencing. For the purpose of appeal, a settled statement was prepared, supplying the recollection of the parties and the court of the content of the unreported sidebar discussions. The parties were able to fully settle the record as to 66 sidebar discussions; as to 40 more, they recalled at least part of the discussion, and as to 27 discussions, no settled statement is provided. Of the 133 unreported sidebar discussions, 58 took place during jury selection And before the taking of testimony. To put the matter in perspective, we note that the trial extended over 53 court days. Most importantly, the trial court told counsel it was appropriate to put their objections on the record; it

was only their sidebar arguments the court refused to order reported in every instance. Many sidebar conferences were in fact reported. Counsel followed the court's advice; the record bristles with hundreds of evidentiary and other objections, and the court's rulings thereon. With respect to every issue raised on appeal, we have found the record sufficient to permit review. It is in this context that we must find that any abuse of discretion, assuming it existed, was not prejudicial, because the record is clearly adequate for meaningful appellate review.

Defendant admits that he did settle the record regarding most of the 133 unreported bench conferences, but he claims that there remain disputes over several conferences involving his motion to sever his trial from that of the codefendants, voir dire, juror misconduct, admission of testimony and statements of codefendant Corona, certain hearsay objections, guilt phase instructions, prosecutorial misconduct, notice of evidence in aggravation at the penalty trial, and admission of improper evidence in aggravation. He claims that in some instances, an objection vital to preservation of an issue on appeal is not recorded because of the trial court's decision not to order the transcription of bench conferences. As it appears in our discussion of each of these issues, however, we have found the record adequate to permit our review of each claim.

Defendant asserts a constitutional basis for his claim, arguing that substantial defects or omissions in a trial record impair a defendant's Sixth Amendment right to effective assistance of counsel on appeal. He also argues that an effective appeal is impossible without an adequate record, and that an

inadequate record is fundamentally incompatible with the Eighth Amendment and its requirement that there be a reliable determination whether death is the appropriate penalty.

Defendant argues that the burden is on the People to demonstrate that the unreported proceedings are immaterial, citing *March v. Municipal Court* (1972) 7 Cal.3d 422, 428, 102 Cal.Rptr. 597, 498 P.2d 437, and *Draper v. Washington* (1963) 372 U.S. 487, 499, 83 S.Ct. 774, 780, 9 L.Ed.2d 899. However, those cases involved invidious discrimination in the preparation of transcripts on appeal. These cases were designed to vindicate the principle that indigents must be afforded "as adequate and effective appellate review as that given appellants with funds..." (*Draper v. Washington*, *supra*, at p. 496, 83 S.Ct. at p. 779.) The high court as well as this court have said that when the grounds for appeal suggest a colorable need for a transcript of the proceedings, the burden is on the state to show that a partial transcript or some alternative method will provide as effective an appeal as is available to the wealthier defendant who can pay for the transcript. (See *Mayer v. Chicago* (1971) 404 U.S. 189, 195, 92 S.Ct. 410, 415, 30 L.Ed.2d 372; *March v. Municipal Court*, *supra*, 7 Cal.3d at pp. 427-428, 102 Cal.Rptr. 597, 498 P.2d 437.) Here there is no invidious discrimination, and the principles of these cases are inapplicable. To the extent they are instructive because they describe the importance of an adequate record on appeal, defendant misstates the burden on the prosecutor, which is not to show that any omission is "immaterial," as defendant

claims, but to show that the transcript is sufficient to assure adequate appellate review.[8]

Defendant's constitutional claims founder on our rejection of his premise that the omissions in the record are substantial.[9] They are not, even if we place the burden of proof on the People on this point as he would have us do. Rather, as we have explained, as to every issue raised on appeal, we have found the record perfectly adequate for the purpose of review; in an excess of caution, we have in one instance assumed that an objection was preserved in an unreported sidebar conference, but in every other instance we have been able to decide the issues raised without resorting to any such presumption. Finally, our review of the record convinces us that defendant's claim that there might be issues he could have raised if he had seen all the sidebar conferences transcribed is pure speculation. Therefore we must reject his claim as a matter both of federal

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[8] Defendant also argues that when the state is responsible for any defect, it is respondent's burden to show the error is harmless, citing *Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705. *Chapman* says no such thing; rather, it places the burden on the respondent to show that the error is harmless when the error is of federal constitutional magnitude. We find no such error.

[9] Defendant's claim that *Chessman v. Teets* (1957) 354 U.S. 156, 163-164, 77 S.Ct. 1127, 1131-1132, 1 L.Ed.2d 1253, established a due process right to a particular form of record on appeal is distortion. Far from holding that the record was constitutionally inadequate in itself, the court found that the defendant's rights to due process and counsel were violated when the disputed record was settled at an ex parte hearing in which he had no voice.

constitutional law and state law.

2. Juror Misconduct

Defendant argues that prejudicial jury misconduct occurred when two prospective jurors who did not serve on his jury read a newspaper article about another capital trial. He claims the information they gleaned from this article may have infected the rest of the venire, in violation of his rights to due process, an unbiased jury, and a reliable determination of penalty.

The record shows that during voir dire, it came to the court's attention that prospective jurors may have read a newspaper article relating the ambivalence of capital defendant Robert Bloom toward his death sentence. The headline read: "Judge ponders sentencing of killer who says he's had a change of heart." The article reported that though Bloom had requested his jury to impose the death penalty, he actually hoped for a sentence of life imprisonment. The article noted Bloom's antagonism to the jury and to his trial counsel, and noted that Judge Albracht, who also presided in defendant's case, was considering appointing new counsel for Bloom. The article quoted Bloom: "'Look,' he said, 'they're not going to execute me. I'll get an automatic appeal. When my case is reversed, I'll do the whole thing differently.'"

Defendant argues that the Bloom article prejudiced him by lessening the jury's sense of responsibility, undermining the gravity of the proceedings, and planting the fear that defendant might some day emerge from prison. (See *People v.*

Milner (1988) 45 Cal.3d 227, 257, 246 Cal.Rptr. 713, 753 P.2d 669; *People v. Ramos* (1984) 37 Cal.3d 136, 157-159, 207 Cal.Rptr. 800, 689 P.2d 430.) The claim is that any juror who read the article would have learned that a death sentence could be reduced to a life sentence by the trial judge, and that there was a likelihood that any death sentence would be reversed on appeal. Defendant also argues that the court failed to perform an adequate inquiry to determine whether other prospective jurors had read the article, and failed to allow counsel to question jurors in private regarding the article, making it impossible to know whether other jurors were affected by it. (See *People v. Adcox*, *supra*, 47 Cal.3d at p. 253, 253 Cal.Rptr. 55, 763 P.2d 906.)

As we said recently, "[i]t is well settled that it is misconduct for a juror to read newspaper accounts of a case on which he is sitting...." (*People v. Holloway*, *supra*, 50 Cal.3d at p. 1108, 269 Cal.Rptr. 530, 790 P.2d 1327; see also *People v. Hernandez* (1988) 47 Cal.3d 315, 338, 253 Cal.Rptr. 199, 763 P.2d 1289.) In fact, we have warned against the reading of " 'any matter in connection with the subject-matter of the trial which would be at all likely to influence jurors in the performance of duty....' " (*People v. Holloway*, *supra*, 50 Cal.3d at p. 1108, 269 Cal.Rptr. 530, 790 P.2d 1327, quoting *People v. McCoy* (1886) 71 Cal. 395, 397, 12 P. 272.)

As the trial court found, on its face the Bloom article had absolutely nothing to do with defendant's case. However, to the extent that the article implied that a trial court could reduce a sentence of death to a life term, or that a conviction might be reversed on appeal, it could be considered extraneous legal

information that would be misconduct for a juror to consider. (See *People v. Marshall* (1990) 50 Cal.3d 907, 950, 269 Cal.Rptr. 269, 790 P.2d 676; *In re Stankewitz* (1985) 40 Cal.3d 391, 397, 220 Cal.Rptr. 382, 708 P.2d 1260; see also *People v. Anderson* (1990) 52 Cal.3d 453, 468, 276 Cal.Rptr. 356, 801 P.2d 1107 [jury should generally not be advised regarding availability of appeal in capital cases].)

Though a presumption of prejudice attaches to jury misconduct, we think that the presumption arising from any misconduct relating to the Bloom article is readily dispelled. (See *People v. Holloway*, *supra*, 50 Cal.3d at p. 1108, 269 Cal.Rptr. 530, 790 P.2d 1327.) The prospective juror who clipped the article showed it only to one other venireman. Neither man actually served on defendant's jury. Defendant's argument that the court erred in failing to inquire of the rest of the panel whether they had read the article is tenuous; since the article was found just where the prospective juror had left it in the courthouse it is speculative to argue that other jurors may have seen it. (Compare *People v. Ramirez* (1990) 50 Cal.3d 1158, 1175, 270 Cal.Rptr. 286, 791 P.2d 965 [insufficient evidence that one juror's misconduct tainted others to trigger duty of inquiry].)

Even if we take into account the possibility that other jurors may have read the article, we think that any such misconduct, speculative as it is, is not prejudicial. The presumption of prejudice may be dispelled by an admonition to disregard the improper information. (*People v. Cooper*, *supra*, 53 Cal.3d at p. 838, 281 Cal.Rptr. 90, 809 P.2d 865; see also *People v. Holloway*, *supra*, 50 Cal.3d at pp. 1111-1112, 269

Cal.Rptr. 530, 790 P.2d 1327.) We generally presume that jurors observe such instructions. (*People v. Adcox, supra,* 47 Cal.3d at p. 253, 253 Cal.Rptr. 55, 763 P.2d 906.) Here, the court admonished the entire panel to disregard the article, that the article contained errors, and that only the evidence presented at trial was to be considered. Further, the problem arose at an early stage of the proceedings, when attention was not focused on the sentence to be imposed. The problem is comparable to that presented by offhand remarks of a juror or even the prosecutor regarding the possibility of commutation that we have held nonprejudicial when they occur at the voir dire stage. (See, e.g., *People v. Kaurish* (1990) 52 Cal.3d 648, 709, 276 Cal.Rptr. 788, 802 P.2d 278 [juror told of early release of relative convicted of murder]; *People v. Walker, supra,* 47 Cal.3d at p. 627, 253 Cal.Rptr. 863, 765 P.2d 70 [prosecutor asked jurors on voir dire what they thought life without parole really meant]; *People v. Ghent, supra,* 43 Cal.3d 739, 769-770, 239 Cal.Rptr. 82, 739 P.2d 1250 [prosecutor referred to commutation power in voir dire].) The misconduct alleged does not support a finding that there is "a substantial likelihood that at least one juror was impermissibly influenced to the defendant's detriment...." (*People v. Marshall, supra,* 50 Cal.3d at p. 951, 269 Cal.Rptr. 269, 790 P.2d 676.) Accordingly we hold that the presumption of prejudice arising from any misconduct has been rebutted.[10]

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[10] Because we find the presumption dispelled, we need not reach respondent's claim that the presumption arises only when there is misconduct after the commencement of deliberations, or that defendant's failure to move for mistrial waives the

(continued...)

Defendant claims there was a further incident of jury misconduct when, before closing arguments of counsel at the guilt phase began, two jurors read an article in the Los Angeles Times lionizing the prosecutor in defendant's case. Among many anecdotes, it recounted how, in defendant's case, the prosecutor refused to stipulate that a photograph displayed one of the victims, and instead flew in the victim's mother, who broke down on the stand when called upon to identify the photograph. Defendant objects that the article made the prosecutor seem glamorous and successful, that it suggested that she only prosecuted guilty recidivists, and that it enhanced the poignancy of her claim that defendant was a Nazi by disclosing her own family's fate in the Nazi death camps.

Counsel for both defendants made a motion for mistrial, but the court denied the motion, explaining that it found the article at least as damaging to the prosecution as it was helpful. The court pointed out that the article characterized the prosecutor as "the master of overkill" and an "actress," as someone whose aggressiveness had won her loathing, as callous, heartless, cold, and able to win only easy cases, and as one who attempts to manipulate the jury with witnesses called only for dramatic purposes. The court assumed that all the jurors had read the article, but finding no prejudice, determined to address the problem with an admonition to the jury. The court informed counsel they could question the jurors as necessary, but without sequestration.

(...continued)
claim.

When the court questioned the jury about the article, it appeared that two regular jurors and one alternate had read the article. Another regular juror explained that she had only read the headline, and then asked her husband to save the article. When asked whether the article had any effect on their ability to be fair, one of the jurors who had read the article responded that her interest had been in the description of the prosecutor's wardrobe "and things of that nature." The other juror who had read the article did not respond.

The court commented that it found the article did not reflect on the guilt or innocence of the accused. It instructed those jurors who had not read the article not to do so, and instructed those who had read it to recognize that news articles contain many errors, and to decide the case solely on the basis of properly introduced evidence. Counsel for defendant had no further questions, while counsel for codefendant Brown unsuccessfully renewed his request for individual voir dire of the jurors who had read the article.

Respondent concedes, citing our decision in *People v. Hernandez, supra,* 47 Cal.3d at page 338, 253 Cal.Rptr. 199, 763 P.2d 1289, that to the extent the article contained any information about defendant's case, it was misconduct for any juror to read it. Indeed, as we have seen, it is misconduct for a juror to consult any material outside the record that is connected to the trial and that may influence a juror in the performance of his or her duty. (*People v. Holloway, supra,* 50 Cal.3d at p. 1108, 269 Cal.Rptr. 530, 790 P.2d 1327.) Nonetheless, we are persuaded that the presumption of prejudice is

rebutted. The court admonished the jury to disregard the article. (See *id.* at pp. 1111-1112, 269 Cal.Rptr. 530, 790 P.2d 1327.) Further, the content of the article was innocuous. The suggestion that the prosecutor handled only recidivists would have had no effect on jurors, since defendant had already testified that he was a professional robber who had a prior conviction. Because she was prosecuting, the suggestion that the prosecutor could never *defend* a guilty person did not convey, as defendant claims, the implication that she personally believed defendant to be guilty. The description of her technique of calling the victim's mother only served to discredit her as engaging in patent manipulation of the jury. The article quoted her as saying of the incident, "the image of the tearful mother was clearly implanted in the minds of the jurors.... I take no chances; you never know what the jury is going to do." Finally, the information that the prosecutor had suffered personally from the Nazis and from anti-semitism could only have raised an inference that she had a personal bias against defendant, an inference that would not enhance her prestige with the jury.

This is not a case in which the jury received inadmissible evidence relating to guilt or innocence, or received improper legal information from outside sources. Rather, the article on the prosecutor was essentially a gossipy human interest story emphasizing her glamour and aggressiveness. Far from introducing the jury to new facts or law, it explored an area the jury was peculiarly well suited to evaluate for itself; the personality and human qualities of the deputy district attorney they had been watching in action for so long. (Compare *People v. Marshall, supra,* 50 Cal.3d at p. 950, 269 Cal.Rptr.

269, 790 P.2d 676.) Finally, as the trial court perceived, the overall impression the article created was far from favorable to the prosecutor. Considering the contents of the article, and the court's admonition to the jury to disregard it and be bound by the evidence presented at trial, we find that the presumption of prejudice is rebutted. (See *People v. Marshall,, supra,* 50 Cal.3d at pp. 951-952, 269 Cal.Rptr. 269, 790 P.2d 676.)

We reject defendant's argument that the court's failure to question each juror privately regarding the impact of the article violated defendant's rights to a fair trial and a reliable determination of penalty by an unbiased adjudicator under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 8, 16 and 17 of the California Constitution. Certainly, when there is a claim of juror misconduct, the court must conduct "an inquiry sufficient to determine the facts ... whenever the court is put on notice that good cause to discharge a juror may exist." (*People v. Burgener* (1986) 41 Cal.3d 505, 519, 224 Cal.Rptr. 112, 714 P.2d 1251.) But failure to conduct a sufficient inquiry is ordinarily viewed as an abuse of discretion, rather than as constitutional error. (*Id.*, at p. 520, 224 Cal.Rptr. 112, 714 P.2d 1251, see also *People v. Adcox, supra,* 47 Cal.3d at p. 253, 253 Cal.Rptr. 55, 763 P.2d 906, but see *People v. McNeal* (1979) 90 Cal.App.3d 830, 840, 153 Cal.Rptr. 706 [applying harmless-beyond-reasonable-doubt standard].) This is not a case in which the trial court conducted no inquiry. The court determined which jurors had read the article, asked them if their impartiality were impaired, and admonished them to disregard the article. The court

also admonished the rest of the jury not to read the article and to disregard any mention of it. While individual questioning may have been preferable, we have never held that it is constitutionally required.

Further, although we do not agree with respondent that trial counsel waived the issue of jury misconduct, we do note that counsel declined the opportunity to question the jury as a group on the article. (Compare *People v. Burgener, supra,* 41 Cal.3d at p. 521, 224 Cal.Rptr. 112, 714 P.2d 1251 [defense counsel in part responsible for inadequate record regarding misconduct].) Under the circumstances, even if we were of the view that the trial court should have inquired more fully into the question of misconduct, no prejudice appears.

3. Self-Representation

For a brief period that ended six months before the commencement of trial, defendant represented himself. Advisory counsel was appointed to assist him. Defendant claims the trial court erroneously granted his motion to represent himself. He claims that because there is no reporter's transcript of the hearing at which the motion was granted, and thus no record that the court advised defendant of the dangers of self-representation, reversal of the entire judgment is required.

A defendant seeking self-representation "'should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."'" (*People v. Bloom* (1989) 48 Cal.3d 1194, 1224-1225, 259

Cal.Rptr. 669, 774 P.2d 698.) As long as the record as a whole shows that the defendant understood the dangers of self-representation, no particular form of warning is required. "The test of a valid waiver of counsel is not whether specific warnings or advisements were given but whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case." (*Id.* at p. 1225, 259 Cal.Rptr. 669, 774 P.2d 698; see also *People v. Jones* (1991) 53 Cal.3d 1115, 1142, 282 Cal.Rptr. 465, 811 P.2d 757.)

Defendant's reliance on the deficiency of the record is misplaced. Although there is no reporter's transcript of the hearing at which the motion was granted, there is a full record of an earlier hearing that discloses the defendant was made aware of the disadvantages of self-representation. The reporter's transcript shows that on March 3, 1983, defendant moved to represent himself. The court asked if defendant thought he could save his life, and whether defendant realized the prosecutor was "trying to kill [him]." Defendant responded that he had known the stakes for over a year, and that he thought he could properly represent himself. The court informed defendant it would be difficult to represent himself while confined in jail, especially with defendant's history of difficulties following jailhouse rules. The court urged on him the advantages of keeping his counsel, explaining that counsel was trained and experienced, while defendant was not. He reminded him of his constitutional right to counsel. Defendant acknowledged that he understood he had a right to counsel but could knowingly waive that right. The court put the matter over to permit defendant to

think about his request. The clerk's transcript indicates that on March 16, 1983, the court advised defendant of his constitutional right to be represented by counsel and defendant waived the right and was permitted to proceed in propria persona. In later appearances, the court urged advisory counsel on defendant, and advisory counsel was appointed on May 24, 1983.

We are satisfied that the record of the March 3, 1983, hearing demonstrates defendant was adequately advised regarding the dangers of self-representation. Because we so conclude, we need not consider defendant's argument that the error in granting him in propria persona status was reversible per se, or that the error was prejudicial under any other standard.

Defendant argues that during his brief period of self-representation, the court violated his rights under the Fifth, Sixth and Fourteenth Amendments to the federal Constitution and parallel rights under the state Constitution by permitting him and his former counsel to testify at a hearing on his motion to dismiss. He claims that his testimony and that of counsel provided "windfall" discovery to the prosecution regarding defendant's intention to present an alibi defense, and that the court should have excluded the district attorney before permitting such testimony.

Defendant's motion was obviously not a *Marsden*(*People v. Marsden* (1970) 2 Cal.3d 118, 124, 84 Cal.Rptr. 156, 465 P.2d 44) motion, as defendant now claims, since at the time of the motion he had already removed his appointed counsel and was

representing himself. Instead, he attempted to persuade the court to dismiss the case against him because of inadequate time waivers and prosecutorial misconduct, and because his previous counsel had failed adequately to investigate his defense. This was clearly an adversarial hearing that could not proceed without the presence of the district attorney to represent the interests of the state. It is true that defendant testified and called counsel to the stand, disclosing defendant's intent to produce alibi witnesses. We observe, however, that the court cautioned him about his privilege against self-incrimination and his attorney-client privilege. Any harm to defendant was self-inflicted; "[d]efendants who have elected self-representation may not thereafter seek reversal of their convictions on the ground that their own efforts were inadequate...." (*People v. Bloom*, supra, 48 Cal.3d at p. 1226, 259 Cal.Rptr. 669, 774 P.2d 698.)

C. *Issues Affecting the Trial of Guilt*

1. Severance of Counts

Defendant claims the trial court erred in refusing to sever count VI, the Croutch robbery, in violation of state and federal guarantees of due process and equal protection. We apply the law applicable before the adoption of Proposition 115, the "Crime Victims Justice Reform Act," at the June 5, 1990, election. (*People v. Sully* (1991) 53 Cal.3d 1195, 1221-1222, 283 Cal.Rptr. 144, 812 P.2d 163.) Here it is undisputed that the statutory requirements for joinder were met. (§ 954.)

The People contend that defendant waived the

issue. Because of defendant's claim that the record is inadequate to permit our review of this claim, we must examine the record in detail. On January 5, 1984, five days before the commencement of jury selection, the court reopened codefendant Brown's demurrer to the complaint on the ground that it failed to allege that the special circumstances required proof of intent to kill. The court was considering amending the information to obviate the difficulty, but no decision was reached. As counsel were reviewing the information, counsel for defendant said: "Among the motions that we will make, and this will be an oral motion, at the time, we will consider a motion to sever, which I believe the court has been advised that Mr. Sussman and I are both going to make orally. Among those motions will be a motion to excise Count VI from the complaint, and I just wanted to-so it wouldn't come as any shock, and the basis will be Count VI, which was isolated from the other counts in Count V, bias and prejudice, but I wanted to advise at this time, at least, the court and the district attorney, that we will be making that motion at the proper time." Then codefendant Brown made a motion to sever his trial from that of defendant. Defendant responded, "because of the fact we late announced that we were going to sever Count VI from the complaint, and from something Mr. Dettmar kindly reminded me of, I would respectfully move the court to allow us to make our motion to sever Mr. Pinholster from Mr. Brown as well as sever count VI until a later time, presumably Monday morning. [¶] We want to look into it, and it's something that late occurred to my esteemed associate...." The court responded: "Fine. I have no problem with that. I would withhold a ruling on the argument currently pending before this court

made by [codefendant] and will allow counsel to address more fully and completely the motion to sever on Monday." On Monday, the matter was continued to Tuesday, January 10, when codefendant renewed his motion to sever his case from defendant's, or at least empanel two juries. Defendant argued against the empanelment of two juries, and referred tangentially to his desire to sever his case from the codefendant's. He said nothing about severing count VI. The court denied the motion for severance and for separate juries, and then indicated that they would go off the record for a moment. The record discloses no further discussion of or ruling on any motion to sever counts.

We agree with respondent that the above record discloses a failure formally to move for severance of the count and to press for a ruling on the issue, a failure that constitutes a waiver of the issue on appeal. (*People v. Miranda* (1987) 44 Cal.3d 57, 77-78, 241 Cal.Rptr. 594, 744 P.2d 1127.) Defendant claims it is "highly likely" he renewed his motion at the unreported sidebar conference noted above, though there was no settled statement regarding this sidebar discussion. We see no basis for this optimism, but conclude that even if the issue were properly preserved, any error in the court's failure to sever count VI was clearly harmless.

There was overwhelming evidence of defendant's guilt on the other charges. Corona was present at the scene and his testimony described defendant's homicides in detail; his testimony was corroborated by the discovery of defendant's palm print in the house and of the bloodstained items in defendant's apartment, and also by the testimony of

several witnesses regarding defendant's conduct before and after the crimes. There was ample evidence of defendant's intent to rob Kumar from the testimony of Lisa Tapar and Charles Kempf, as well as from defendant's own testimony. Nor was the evidence of the Croutch robbery inflammatory compared to the evidence of the double homicide. Rather, defendant himself used the Croutch robbery in his defense, claiming to be a frank robber who used a handgun rather than a burglar who would kill people. This was not a case where joinder bolstered a weaker case with strong evidence of guilt in another case. It is not reasonably probable that a result more favorable to defendant would have been reached if the Croutch robbery had been severed. (*People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243; see also *People v. Bean* (1988) 46 Cal.3d 919, 940, 251 Cal.Rptr. 467, 760 P.2d 996; *People v. Miranda, supra,* 44 Cal.3d at p. 78, 241 Cal.Rptr. 594, 744 P.2d 1127.)

2. Severance of Defendants

Defendant contends the trial court abused its discretion and violated his right to due process when it denied his motion to sever his trial from that of codefendant Brown. At the hearing on the motion, defense counsel was not precise in arguing that joint trial would be prejudicial. He said: "But at the beginning when I first got into the case, I was anxious to make a motion to sever because Mr. Pinholster has enough to encounter in this case without hearing the other evidence that might come in with regard to Mr. Brown that might not be present in an independent trial. [¶] I don't know exactly what I am talking about there because I don't

know what the defenses would be, but it's a principle that we have to be conscious of." He also argued that the district attorney's decision to seek the death penalty against him but not against Brown would prejudice him.

There is a statutory preference for joint trial of jointly charged defendants. (§ 1098.) "A 'classic' case for joint trial is presented when defendants are charged with common crimes involving common events and victims." (*People v. Keenan* (1988) 46 Cal.3d 478, 499-500, 250 Cal.Rptr. 550, 758 P.2d 1081.) Though severance is in the sound discretion of the trial court, severance should generally be granted " 'in the face of an incriminating confession [by a codefendant], prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony.' " (*Id.* at p. 500, 250 Cal.Rptr. 550, 758 P.2d 1081, quoting *People v. Turner, supra,* 37 Cal.3d at p. 312, 208 Cal.Rptr. 196, 690 P.2d 669; *People v. Massie* (1967) 66 Cal.2d 899, 917, 59 Cal.Rptr. 733, 428 P.2d 869.) Whether it is an abuse of discretion to deny severance depends on the facts as they appear at the time of the hearing on the motion. (*People v. Boyde* (1988) 46 Cal.3d 212, 232, 250 Cal.Rptr. 83, 758 P.2d 25, overruled on another point *sub nom. Boyde v. California* (1990) 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316.)

No facts before the trial court indicated that any of the above grounds for severance existed in this case. There was no evidence of sharply antagonistic defenses, and no indication that Brown would testify against defendant or that he had made incriminating

statements that would prejudice defendant. Separate trials would have consumed a great amount of scarce judicial resources, and defendant did not demonstrate the kind of substantial prejudice that would justify such an expenditure.

Defendant contends evidence that Brown's association with the Aryan Brotherhood would be prejudicial. However, defendant points to voir dire questions and evidence at trial to substantiate this claim, and obviously the trial court could not have considered this at the time of the hearing. There was preliminary hearing testimony, though certainly no one argued this to the court, that Corona was afraid to go to the police because of Brown's Aryan Brotherhood connection. This evidence would tend to make Brown appear to be the more violent of the two men, and arguably the ringleader. Because this evidence might be more useful than prejudicial to defendant, it would not compel the severance of the two men's trials.

Defendant also refers to voir dire questions and statements of Brown's counsel in arguments to the jury suggesting that Brown would concede defendant's guilt. Again, the statements relied on were not before the court at the time of the motion; even regarding the threat of such statements as inevitable at the time of the hearing, we have made it clear that a defendant's natural tendency to shift blame onto a codefendant is not in itself a sufficient ground for severance. (*People v. Turner, supra,* 37 Cal.3d at pp. 312-313, 208 Cal.Rptr. 196, 690 P.2d 669.)

"After trial, of course, the reviewing court may

nevertheless reverse a conviction where, because of the consolidation, a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law." (*People v. Turner, supra,* 37 Cal.3d at p. 313, 208 Cal.Rptr. 196, 690 P.2d 669.) Defendant's references to the evidence relating to the Aryan Brotherhood and to codefendant's arguments to the jury may be understood to raise such a claim. As we have said, the efforts of codefendants to shift blame onto each other are not inherently prejudicial. Here, codefendant Brown's argument simply was that while there was ample evidence of defendant's guilt, the evidence was shakier as to Brown's guilt. This argument barely emerged in Brown's opening argument. It was raised in Brown's closing argument, but the argument was technical. Brown's counsel suggested that Art Corona's statement had been corroborated as it implicated defendant, but not as it implicated Brown. Defendant's complaint that Brown urged the admission of the Corona statement to the police cannot be counted a "gross unfairness," since, as we have seen, defendant himself did not object to the admission of the evidence.

Further, any suggestion that Brown was innocent even if defendant were found guilty came from arguments of counsel, rather than from testimony or out-of-court statements of Brown. This reduced the prejudicial impact of Brown's attempt to shift blame onto defendant. (Compare *People v. Massie, supra,* 66 Cal.2d at p. 919, 59 Cal.Rptr. 733, 428 P.2d 869 [codefendant's confession implicates defendant].) Finally, the two codefendants did not have completely inconsistent defenses; both claimed alibis depending in part on the same evidence of a party at defendant's apartment complex, and Brown

simply claimed that the reasonable doubt of his guilt was greater than the reasonable doubt of defendant's guilt.

As for the claim that evidence of Brown's Aryan Brotherhood connection prejudiced defendant, the theory that the jury would be convinced of defendant's guilt because of tangential evidence that his codefendant was associated with the Aryan Brotherhood is untenable under the state of the evidence in this case.

3. Improper Admission of Evidence

a. *Corona Tape*

The court permitted to be played to the jury a tape recording of prosecution witness Corona's interview with the police. In this interview, Corona recounted the events that culminated in the two murders with which defendant was charged. In passing, Corona alluded to defendant's prior robberies and drug activities, mentioned that defendant knew people in the Aryan Brotherhood, and said that he had heard that defendant was involved in an incident in which two people died. Defendant contends this inadmissible hearsay prejudiced him and its admission into evidence requires reversal of the judgment because it violated his state and federal constitutional rights to confront witnesses, to a fair trial, and to a reliable sentencing determination.

Defendant concedes that there is no objection on the record to the admission of this evidence, but contends that an objection must be presumed, in part

because of the trial court's refusal to order that all sidebar conferences be reported. However, we have examined the reporter's transcript and the parties' settled record regarding the untranscribed sidebar discussions, and see absolutely no indication that defense counsel objected to the admission of this evidence. As we have already noted, the court directed counsel that although it would not order the transcription of all sidebar conferences, counsel would be permitted to make all their objections on the record.

We agree with respondent that not only did defense counsel not object, the record shows that they desired the evidence to be presented. Counsel collaborated with the prosecutor in drafting a transcript of the recording, and did not demur when the prosecutor said that she presumed they all wanted the tape played. Most significantly, at the conclusion of Corona's testimony, when the prosecutor moved to play the tape, the court asked: "Is it the intention of all parties that we should play this tape?" Counsel for defendant responded: "No objection." There was some discussion of errors in the transcription, but no suggestion whatever that defense counsel had moved to edit any prejudicial material out of the transcript or that they objected in any way to the playing of the tape. The jury was told to use the transcript of the recording, which defense counsel had helped prepare, as an aid.

Counsel did not object to supplying the jury with the transcript during deliberations, and the following exchange gives an indication that the trial court understood that there were tactical reasons for the decision to allow the tape to be played: "The

Court: ... I think at the time we discussed that, at the time it was received into evidence, it was my understanding that neither side objected, and as a matter of fact there was material in there that the defense believed was important to them, and everyone, at that point in time, at least agreed that the transcript was a joint effort, transcribing those notes by the prosecution and defense, was advantageous to both sides and it was received in evidence without objection. [¶] Mr. Dettmar [defendant's counsel]: I have just had a chance to discuss with Mr. Brainard [cocounsel], and it was his recollection, too, so apparently there will be no objection as to Mr. Pinholster." Finally, at the close of the prosecutor's case, when she formally moved all the items marked for identification into evidence, counsel for the defendants were directed to note their objections to any items, with the assumption that "any items not mentioned by the defense shall be admitted without objection...." There was no objection to the tape or the transcript and therefore it was admitted. Counsel also did not object to the replaying of the tape to the jury during deliberations.

"It is, of course, 'the general rule that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal.'" (*People v. Poggi* (1988) 45 Cal.3d 306, 331, 246 Cal.Rptr. 886, 753 P.2d 1082, quoting *People v. Rogers* (1978) 21 Cal.3d 542, 548, 146 Cal.Rptr. 732, 579 P.2d 1048.) Defendant counters that any failure to object necessarily was ineffective assistance of counsel, in violation of state and federal constitutional guarantees.

Defendant's burden is to show that counsel's performance was deficient and that the deficiency prejudiced him. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-689, 104 S.Ct. 2052, 2064-2065, 80 L.Ed.2d 674; *People v. Ledesma* (1987) 43 Cal.3d 171, 216, 217, 233 Cal.Rptr. 404, 729 P.2d 839.) "'Reviewing courts will reverse on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.'" (*People v. Cox* (1991) 53 Cal.3d 618, 659, 280 Cal.Rptr. 692, 809 P.2d 351, quoting *People v. Fosselman* (1983) 33 Cal.3d 572, 581, 189 Cal.Rptr. 855, 659 P.2d 1144.)

Here, a rational tactical reason appears for counsel's choice; the defense theory, and indeed defendant's testimony, was that he was a professional and accomplished robber of drug dealers who always used a firearm, not a bungler who would use a knife and associate with a knife-wielding burglar like Corona. (Compare *People v. Cox supra*, 53 Cal.3d at p. 660, 280 Cal.Rptr. 692, 809 P.2d 351 [tactical reason for defense counsel to elicit evidence of defendant's gang activity].) He needed to create an impression of candor to carry his testimony that he had broken into the Kumar house on the night of the murder, but had stolen the drugs and left before Corona arrived and stabbed the murder victims. Accordingly, his own testimony recounted his violent criminal past; the Corona tape, in its passing comments on defendant's exploits, simply confirmed what defendant was willing to say about himself. The reference to defendant's knowledge of people involved in the Aryan Brotherhood was clearly innocuous, since Corona testified that it was Paul Brown who

was affiliated with the Aryan Brotherhood and that it was Brown, not Pinholster, that Corona feared.

Further, the tape contained statements inconsistent with Corona's trial testimony, showed Corona's eagerness to cooperate with the police, and contained some reference to Corona's contact with one "Butch," who defendant claimed was Corona's actual accomplice. All these factors made the playing of the tape advantageous to defendant. In fact, defense counsel made use of it in closing argument. On this record, we find no ineffective assistance of counsel.

b. *Quartararo Testimony*

Gian Norelli, a defense witness, testified that he was present when the abortive plan to rob Kumar was discussed, and that Kempf, not defendant, was the ringleader. The prosecutor attempted to impeach Norelli with his inconsistent statement to Detective Quartararo, and Norelli repeatedly claimed that he could not remember what he had told the detective. In particular he was asked whether he had told Quartararo that he thought defendant guilty, that defendant had asked him to lie, and that he had overheard defendant admitting the killing to a third party. Norelli testified that he remembered talking to the officer, but that he could not remember making these statements.

Detective Quartararo was permitted to testify as a rebuttal witness that Norelli had told him all about the abortive plan to rob Kumar. In addition, Quartararo said that Norelli said that he thought defendant had done the murders, that he had

overheard defendant say he had knifed two people in Tarzana, and that defendant had asked Norelli to lie for him about defendant's involvement in the Kempf incident. When asked why Norelli would testify that he did not remember these statements, the detective was permitted to testify as to his opinion that Norelli was afraid of defendant.

Defendant contends that Quartararo's testimony was inadmissible hearsay and opinion evidence, and that its admission violated Evidence Code section 352, and his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their "parallel" provisions in the California Constitution. Respondent argues that any objection beyond the hearsay objection was not preserved for appeal.

The trial court stated for the record that "there was an objection to the testimony of the officer, as well as reference to the document [the detective's notes of the interview.]" The court referred to a sidebar conference on the matter that was unreported. The settled statement indicates that the subject of the unreported conference was defendant's hearsay objection, and that beyond this, counsel were unable to add to the information provided in the reporter's transcript. Because it was the court's ruling on reporting sidebar conferences that created some deficiency in the record on this point, we will assume that counsel properly preserved objections to the evidence on the grounds raised here.

We find Norelli's statements that defendant told Norelli to lie for defendant, that Norelli had overheard defendant tell Steven Crane defendant

had stabbed two people at Kumar's house, and that Norelli thought defendant was guilty, were admissible as prior inconsistent statements. On cross-examination, Norelli had claimed he was unable to remember making these statements to Quartararo. Given Norelli's pattern of deliberate evasions on cross-examination, the prosecutor was entitled to prove that the statements were made through a prior inconsistent statement. (*People v. Green* (1971) 3 Cal.3d 981, 988-989, 92 Cal.Rptr. 494, 479 P.2d 998; Evid.Code, §§ 770, 1235.) Our review of the record persuades us that Norelli was deliberately evasive; a prior ruling on the record to that effect by the trial court is not a condition precedent to our holding that the statements were admissible as a prior inconsistent statement. (See, e.g., *People v. Plasencia* (1985) 168 Cal.App.3d 546, 551, 223 Cal.Rptr. 786;*People v. Burciago* (1978) 81 Cal.App.3d 151, 165, 146 Cal.Rptr. 236.) Further, defendant's right of confrontation was not impaired; the declarant was subject to examination at trial and admitted making a statement to the detective. The jury could evaluate Norelli's demeanor, and defendant had the opportunity to examine him fully regarding his statements to the detective. (See *California v. Green* (1970) 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489; *People v. Green, supra,* 3 Cal.3d at pp. 989 990, 92 Cal.Rptr. 494, 479 P.2d 998.) Nor can we agree with defendant's conclusory claims that the evidence was more prejudicial than probative under Evidence Code section 352, or that its admission violated the laundry list of constitutional provisions defendant notes in passing.

Respondent concedes it was error to admit the testimony that Quartararo was of the opinion that

Norelli was afraid of defendant. We agree with respondent, however, that any error was not prejudicial. Norelli was not the only one who was afraid of defendant, as the evidence that defendant had threatened to "blow up" Corona reveals.

c. *Coercive Plea Bargain*

Defendant contends the terms of the prosecutor's plea bargain with Art Corona were coercive, so that Corona's testimony should have been excluded as unreliable. (See *People v. Garrison* (1989) 47 Cal.3d 746, 767, 254 Cal.Rptr. 257, 765 P.2d 419; *People v. Medina* (1974) 41 Cal.App.3d 438, 116 Cal.Rptr. 133.) He claims a violation of state and federal due process guarantees. He argues that given the history of Corona's cooperation with the police, the agreement should be understood to have impermissibly required Corona to adhere to his prior statements without regard for their truthfulness, and to testify in such a way as to assure defendant's conviction.

The complaint in this case named Corona as well as defendant and Brown in each count except the Croutch robbery. Just before the preliminary hearing, Corona's case was severed. He waived preliminary hearing and testified against defendant and Brown, denying then and at trial that he had been offered or promised leniency in return for his preliminary hearing testimony. His attorney was called as a witness at the preliminary hearing and testified that he and the prosecutor had discussed what might happen if Corona testified. However, the attorney successfully invoked the attorney-client privilege with respect to the content of those

discussions. Seven days later, the prosecutor wrote to Corona's counsel, setting forth the offer defendant now complains of as coercive: "It is my belief that Mr. Corona will testify completely and truthfully at any and all trials in this matter. At the conclusion of all such trials the People agree to dismiss Counts I, II, IV, and V as to Mr. Corona and to amend the information to allege a violation by him of Penal Code section 32. He would then plead guilty to this charge as well as to Count III, the burglary. [¶] The reasons the murder and robbery charges against Mr. Corona will be dropped are twofold: First and foremost, the evidence clearly shows that he did not participate or aid and abet in the killing or robbery of the victims. Secondly, realistically, I believe we need Mr. Corona's testimony to ensure the successful prosecution of the two actual murderers and, even though Mr. Corona has already testified at their preliminary hearing without any 'deals' or promises having been made to him, the fact that he did so and is willing to do so in the future-at a very substantial risk and danger of death to himself and his wife-merits considerable consideration. [¶] I trust you and Mr. Corona will be agreeable to this arrangement."

During voir dire, defendant moved for discovery of any prosecution agreements with Corona. The court granted the motion. Defense counsel stated that with regard to Corona "in reading the preliminary hearing transcript, you get the feeling that there is a deal, but Mr. Corona may not have been fully informed of it by his attorney, although I'm sure [Corona's counsel] had discussed the matter with the district attorney." The prosecutor responded: "I represent to the court, as an officer of the court, with respect to Mr. Corona, the only

discussions are those that are contained in the letter which was sent to his attorney...."

The claim that the prosecutor's offer to Corona was coercive is specious. We have said that a condition that the accomplice testify truthfully is not coercive. (*People v. Andrews* (1989) 49 Cal.3d 200, 231, 260 Cal.Rptr. 583, 776 P.2d 285; *People v. Garrison, supra,* 47 Cal.3d at pp. 769-770, 254 Cal.Rptr. 257, 765 P.2d 419.) The agreement clearly was not conditioned on defendant's conviction. While the prosecutor's letter explained why the prosecution needed Corona's testimony, it imposed no condition on that testimony. The explanation was probably aimed at allaying Corona's counsel's fear that a trial court might reject the bargain being offered to his client.

Defendant claims that Corona's police interrogator told him that if he changed his story, he would be "hung out," and that only his statement to the police would "mean anything." He claims that Corona therefore must have understood that the bargain offered by the prosecutor was conditional on his not changing his story. But the prosecutor's offer itself simply does not bear such a construction, and the context of the interrogation does not support the claim that any kind of bargain was struck at that time.

4. Failure to Disclose Evidence

The prosecutor has a duty, founded on due process, to disclose substantial material evidence favorable to the accused, including matters relating to the credibility of witnesses and inducements made

to secure their testimony. (*People v. Pensinger, supra,* 52 Cal.3d at pp. 1271-1272, 278 Cal.Rptr. 640, 805 P.2d 899.) "Under the federal Constitution, 'the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.' " (*Id.* at p. 1272, 278 Cal.Rptr. 640, 805 P.2d 899, quoting *United States v. Bagley* (1985) 473 U.S. 667, 678, 105 S.Ct. 3375, 3381, 87 L.Ed.2d 481.)

Defendant claims the prosecutor's failure to disclose certain elements of the plea bargain offered Corona was a violation of due process that requires reversal. He points to indications that the prosecution and the police had conversations with Corona before the preliminary hearing, arguing that this controverts the prosecutor's statement that the first discussion of a plea with Corona's counsel was her letter offering the deal. Though the record does show, as defendant claims, that Corona had contact with the police and the prosecutor before the preliminary hearing, defendant can point to no evidence that any leniency or inducements to testify were offered then. Corona's attorney stated at the preliminary hearing that he had discussed what might happen to Corona with the prosecutor before the hearing, but there was no indication that any agreement was reached or that any inducement was conveyed to Corona-quite the opposite.

Defendant claims that the prosecutor failed to disclose that the police offered protection for Corona's wife, and that when Corona consented to have his house searched in connection with the murder, the police reassured him he would not be prosecuted for any "dope" found there. Neither of these are in any

way substantial inducements to testify, and in any case, they were contained in the tape and transcript of Corona's interview with the police, a document defendant had in advance of Corona's testimony. Art Corona's request for protection for his wife came out at the preliminary hearing, as well. Neither does Casey Corona's trial testimony that the prosecutor helped her get into a drug treatment program show any connection with Corona's plea bargain, and in any event, defendant could have recalled Corona for further cross-examination when the evidence came to light.

In sum, defendant provides no evidence on this record that the prosecutor failed to disclose inducements offered to Corona for his testimony.

Defendant also claims the prosecutor breached her duty in failing to disclose the identity of five witnesses in a timely manner, and he also may be understood to claim the prosecutor failed to comply with the discovery order in the case.

The claim is meritless. The prosecutor resisted discovery of the identity of three informants, but when the court ordered disclosure, she complied, providing their identities and her notes of their statements to her investigator, as well as the investigator's report on the conversations. None of the informants testified for the prosecution. One of them, Gian Norelli, testified for defendant. Defendant claims that he would have profited by earlier disclosure of Norelli's statements, but in fact, the disclosure was timely and defendant had ample time to investigate Norelli's statement before deciding to call him as a witness. After all, jury

selection did not begin until about a month after compliance, and the evidentiary portion of the trial began almost two months later.

Two other witnesses were not disclosed to defendant until the middle of trial. Each was to be called to testify to Art Corona's prior consistent statements in an effort to rebut defendant's suggestion that Corona's testimony was a fabrication. Thus, it is almost impossible to argue that they could have provided evidence favorable to the accused. In any case, one, Connie Pangburn, was never called to testify. The prosecutor asserted that she only learned a few days earlier that Art Corona had made consistent statements to Pangburn, since the witness earlier had resolutely refused to become involved. The court offered counsel a reasonable amount of time to investigate the new evidence. It is inconceivable that any delay in disclosing her identity could have affected defendant, since Pangburn did not testify.

The other late-disclosed witness was Caesar Corona, Art Corona's brother. He did testify against defendant, and corroborated Art Corona's testimony with evidence of a prior consistent statement. The prosecutor claimed she did not disclose Caesar Corona's identity and statement because "it was never considered it would be relevant." While we may share defendant's skepticism at this statement, again, we fail to see how any delay in disclosing this witness harmed defendant. The court gave defendant ample time to investigate once the witness and his proposed testimony were disclosed. The court said: "I'll give you as much time as you want. You name it, you've got it. Investigate it fully, research it fully."

The defense requested no continuance. It is defendant's burden to show that the failure to timely comply with any discovery order is prejudicial, and that a continuance would not have cured the harm. (*People v. Reyes* (1974) 12 Cal.3d 486, 502, 116 Cal.Rptr. 217, 526 P.2d 225.) There is no suggestion that the defense would have been different had defendant been aware of Caesar Corona's testimony before trial. As a matter of due process there was no suppression of material evidence favorable to the accused, and any failure to timely disclose the witness was harmless and did not undermine the reliability of the proceedings. (See *People v. Pensinger, supra,* 52 Cal.3d at pp. 1273-1274, 278 Cal.Rptr. 640, 805 P.2d 899.)

5. Prosecutorial Misconduct

Defendant charges the prosecutor with multiple acts of misconduct. We begin our discussion with the observation that: "It is, of course, the general rule that a defendant cannot complain on appeal of misconduct by a prosecutor at trial unless in a timely fashion he made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.... It is true that the rule does not apply when the harm could not have been cured." (*People v. Benson* (1990) 52 Cal.3d 754, 794, 276 Cal.Rptr. 827, 802 P.2d 330; see also *People v. Green* (1980) 27 Cal.3d 1, 27-34, 164 Cal.Rptr. 1, 609 P.2d 468.)[11]

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[11] Defendant claims only one instance in which there was an unreported sidebar conference that related to a claim of prosecutorial misconduct. It occurred near the end of the prosecutor's summation

(continued...)

a. *Gang Membership*

Defendant complains that the prosecutor suggested, through improper voir dire, opening statement, questions to witnesses, and closing argument, that he was a member of a prison gang, the Aryan Brotherhood. Absent some connection between the prison gang and proof of the charged offenses, of course, a prosecutor's reference to prison gangs is irrelevant and prejudicial. (*People v. Cox, supra*, 53 Cal.3d at p. 660, 280 Cal.Rptr. 692, 809 P.2d 351; *People v. Malone* (1988) 47 Cal.3d 1, 30, 252 Cal.Rptr. 525, 762 P.2d 1249.) The prosecutor disclaimed any intent to introduce the prison gang theme into her case and, indeed, the trial court announced that it would not permit her to introduce such evidence without a showing of its relevance.

We agree with respondent that it was defense counsel who introduced the theme in voir dire. The defense had requested that questions on this sensitive topic be permitted, in response to the obvious potential that some evidence of Nazi symbols or the Aryan Brotherhood would be introduced at trial. It was in response to defense questions about the Aryan Brotherhood that the prosecutor asked whether jurors had heard of that group. She asked

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(. continued)
at the guilt phase. After the summation, defense counsel put on the record their objection that the argument appealed to passion and prejudice, and suggested that defendant was so guilty that he did not deserve a trial. The settled statement shows that the unreported conference involved the same objection.

one juror, after defense questioning on the point, whether she would favor the defense if the evidence showed that the defendants were associated with the swastika or the initials "S.S." She asked another juror, who told defense counsel he could not be fair in light of any involvement in a Nazi gang, whether he could be fair if the Nazi symbols had nothing to do with the murders. The juror was excused for cause. Further, in none of these instances was there any defense objection or request for admonition.

Contrary to defendant's claim, there was no reference to prison gangs in the prosecutor's opening statement; her statement that defendant scratched a swastika on a car after an altercation with its owner carried no such message and was a proper statement of the evidence to be adduced. In any case, there was no objection to the comment, and so the claim is waived.

Defendant complains also of various questions posed by the prosecutor to witnesses, invoking the rule that it is misconduct for a prosecutor to " 'intentionally elicit inadmissible testimony.' " (*People v. Bonin* (1988) 46 Cal.3d 659, 689, 250 Cal.Rptr. 687, 758 P.2d 1217.) Prosecution witness Kempf recounted his involvement in defendant's unconsummated plan to commit a robbery at the Kumar home. On cross-examination, Kempf revealed that he had testified against the brother of another participant in the plan, one Bob Crane. On redirect examination, the prosecutor asked questions intended to rebut defense questioning suggesting that Kempf was a professional informant. She asked whether he knew that Bob Crane was the head of the Aryan Brotherhood. We see no prejudice, since the

defense objection was sustained, the court directed that there be no further references to the Aryan Brotherhood, Kempf did not answer the question, and the jury was instructed to disregard the question. (See *People v. Warren* (1988) 45 Cal.3d 471, 482-483, 247 Cal.Rptr. 172, 754 P.2d 218.)

Defendant charges that the prosecutor improperly questioned her own witness, Charlie Kempf, by asking whether he knew both defendant and Bobby Crane. There was no objection, and we fail to see how this could possibly have suggested to the jury that defendant was involved with a prison gang. Defendant himself volunteered that he didn't like Kempf because he had testified against Bobby Crane.

Defendant complains the prosecutor suggested his affiliation with prison gangs when she asked him on cross-examination whether he knew what Bobby Crane was incarcerated for and asked: "He is head-he's a pretty powerful person in San Quentin, is he not, sir?" But defendant's objection to this line of questioning was sustained, so we see no possibility of harm to defendant.

Defendant also complains that the prosecutor purposely elicited reference to prison gangs when she asked Art Corona what he talked to codefendant Brown about when they first met, and Corona said: "I remember some conversation about different guys that were in prison affiliated with A.B., Nazis, whatever." There was neither an objection to this question nor a request for admonition, nor do we see any indication that the prosecutor asked the question for the purpose of eliciting an improper answer (see *People v. Bonin, supra,* 46 Cal.3d at pp. 689-690, 250

Cal.Rptr. 687, 758 P.2d 1217; *People v. Warren, supra,* 45 Cal.3d at pp. 482-483, 247 Cal.Rptr. 172, 754 P.2d 218).

Defendant also objects to the prosecutor's attempt to rehabilitate Corona on redirect examination. The defense had pointed out inconsistencies in Corona's statement to the police and his trial testimony, including his failure to tell the police what Brown had said about stabbing one of the victims. On redirect examination the prosecutor showed that Corona failed to tell the police what codefendant Brown had said because he was afraid of Brown, believing that Brown was affiliated with the Aryan Brotherhood. This was arguably proper evidence rebutting a claim that the witness was fabricating his testimony. (*People v. Adcox,* supra, 47 Cal.3d at p. 237, 253 Cal.Rptr. 55, 763 P.2d 906.) In any event, there was neither an objection on the grounds of misconduct nor a request for admonition, and the evidence did not suggest that *defendant* was a member of any gang.

In a related claim, defendant argues it was misconduct for the prosecutor to elicit evidence that defendant had scratched Nazi insignia on a witness's car. He fails to establish that the evidence was inadmissible. As we have seen, the prosecutor called Lisa Tapar, who testified that defendant arrived at her house after midnight on the night of the murders, and that when she denied him admission, he stabbed her front door and vandalized her car with a knife. The evidence was relevant to show his possession and use of a knife at a relevant time, as well as to corroborate Corona's statement regarding the time of the visit and his report of defendant's vandalism of

Tapar's car. Tapar did not see defendant scratching symbols on her car, so it was necessary for the prosecutor to establish that defendant had done so circumstantially, by asking what marks Tapar had discovered on her car and whether they had been there before defendant's nocturnal visit: "What kind of marks were there on your car? A: Swastika, S.S.B. and S.S. or lightning bolts. Q: Lightning bolts? Now what are lightning bolts? A: I think it has something to do with the Nazis." Not only was the evidence relevant, there was neither any objection to its admission, nor any unreported sidebar discussion at or near the time of these questions. The issue, such as it is, is waived.

Defendant also complains of questions the prosecutor asked him. Defendant admitted his visit to Lisa Tapar. He explained that he visited to give her some money and to tell her of the death of his friend, "Shotgun," and not to ask her about Kumar's address. Attempting to impeach this story, the prosecutor asked: "Why did you go over and scratch Lisa's car? A: I do that quite often." She asked him what he had scratched on the car, and he said he had written his nickname and the initials S.F.V., which meant San Fernando Valley. She pursued the subject: "What else did you scratch on that car, sir? A: Probably a swastika. Q: What do you mean, probably? A: I commonly do that. Q: Why do you commonly scratch swastikas on things? A: Symbolizing white power. Q: Are you an advocate of white power, sir? A: Yes. Q: Do you belong to a group that advocates white power? A: No, I do not. Q: So you would scratch a swastika. What else did you scratch on there, sir? A: To the best of my recollection, I think that's all I put there." She

showed him a photograph, and asked what else it showed. He answered, "Two sets of lightning bolts. Q: What are those lightning bolts, sir?" The court interrupted, called the noon recess, and put on the record its concern that the questions would lead to evidence of prison gang affiliation, as to which there had been an objection. The court questioned the relevance of the evidence. The prosecutor explained that she did not expect to elicit evidence of gang affiliation, but of defendant's belief in white power. The court concluded: "As I say, at this point in time, I don't believe that any potential or alleged prison gang or outside-of-prison gang affiliation is relevant."

The court effectively precluded the prosecutor from pursuing questioning that would elicit evidence of gang membership, and we see no possibility of prejudice from the questions that were asked. The prosecutor never claimed that defendant was not a credible witness because he believed in White power, or that his prejudices were probative of his guilt. The issue was simply irrelevant.

Finally, we conclude that to the extent the jury would have understood any of the evidence or questions complained of here as alluding to prison gang membership, there could not have been any prejudice to defendant. Even assuming that in each instance the issue was properly preserved for appeal, and assuming the jury understood the evidence as being relevant to defendant's activities, as opposed to Brown's, we see no prejudice. Evidence of gang membership is considered prejudicial because it tends to establish criminal disposition. (*People v. Cardenas* (1982) 31 Cal.3d 897, 905, 184 Cal.Rptr. 165, 647 P.2d 569.) Here, defendant himself made his

criminal disposition clear. In fact, he gloried in it.

b. *Threats*

Defendant claims the prosecutor committed misconduct in eliciting testimony from Todd Croutch that he had received a threatening phone call from defendant, who said that if Croutch testified, he would be killed. The claim is untenable; such evidence is clearly admissible to show consciousness of guilt. (*People v. Hannon* (1977) 19 Cal.3d 588, 599-600, 138 Cal.Rptr. 885, 564 P.2d 1203; *People v. Slocum* (1975) 52 Cal.App.3d 867, 887, 125 Cal.Rptr. 442.) Questions regarding the reliability of Croutch's identification of the voice as defendant's went to the weight, not the admissibility, of the evidence. Similarly, the prosecutor was entitled to probe defendant about the threats, and to ask Casey Corona whether she had received "threats from either of the defendants." The jury was admonished to disregard her nonresponsive answer that she had received a threat from defendant's brother. Given the form of the prosecutor's question, we see no evidence the prosecutor intended to elicit inadmissible evidence. (See *People v. Warren, supra,* 45 Cal.3d at pp. 482-483, 247 Cal.Rptr. 172, 754 P.2d 218.) She later readily complied with the court's warning that she should not ask any questions along these lines unless she knew the answer was admissible, choosing to abandon the line of questioning.

With regard to questions of Detective Quartararo whether he had an opinion as to why Gian Norelli did not remember his conversation with Quartararo, the questions called for improper opinion testimony, as respondent would agree. The officer

replied that "I believe he is afraid of Mr. Pinholster." The court overruled defendant's evidentiary objection, but any error, whether characterized as evidentiary or as prosecutorial misconduct, is clearly harmless. The jury was already aware of defendant's violent threats against Corona. For the same reason, any error in asking Quartararo why he had moved Corona around from jail to jail, eliciting the answer that Corona "had received some threats at the county jail," was harmless.

c. *Prior Violent Acts*

Defendant argues the prosecutor improperly brought before the jury evidence of defendant's prior uncharged violent acts. Of course, such evidence would be subject to exclusion under Evidence Code sections 1101 and 352; no objection on those grounds appears. Defendant fails even to argue that the evidence complained of was inadmissible. He also fails to show that the prosecutor anticipated the witness's answers and purposefully elicited them. (See *People v. Bell* (1989) 49 Cal.3d 502, 532, 262 Cal.Rptr. 1, 778 P.2d 129; *People v. Bonin, supra,* 46 Cal.3d at p. 689, 250 Cal.Rptr. 687, 758 P.2d 1217.)

Taking the points separately, he objects to a question posed to Art Corona on redirect examination, asking why he had said in his statement to the police that he thought that if defendant were not arrested, he, Corona, would be held solely responsible. Corona answered: "Well, it was one time before this happened, Scott had told me about a shootout he had gotten into in the valley over a dope ripoff-" The court interrupted: "I think that goes beyond the question. Be a little more specific." The prosecutor asked: "What were you referring to?"

and the witness answered: "Just that Scott had gotten away with something like this before." The prosecutor responded, "I don't think you understand the question, Mr. Corona." The court admonished the jury to disregard the testimony as unresponsive and irrelevant. At a sidebar conference, Brown's counsel argued that Corona's answer to the question was so unresponsive to the question that it reflected on his credibility and ability to recall. The court refused to allow Brown's counsel to pursue the issue in his examination of Corona. The suggestion that it was misconduct to ask the question is meritless; it is obvious the prosecutor did not anticipate the answer given and was frustrated with her witness's obtuseness. In any event, Corona's statement itself was admitted into evidence without objection, and it contained references to some of defendant's other activities. That evidence being properly before the jury, this line of questioning cannot have harmed defendant, even if we were to assume, which we do not, that the jury failed to follow the court's admonition.

Defendant also refers to the examination of Charles Kempf regarding why he had backed out of an earlier plan to rob Kumar. Kempf explained that "the vibes were not good" and further that defendant had said, brandishing a knife, that he would get the drugs out of Kumar one way or another. Defendant does not explain in what way these questions were objectionable. When the prosecutor asked whether the witness thought defendant would use the knife, a defense objection was sustained. Defendant does not complain of or even mention the witness's next statement that he became afraid of defendant when defendant said that in an earlier robbery, he had

stabbed the victim in the rectum. In this context, we see no prosecutorial misconduct.

d. *Argument to Jury*

In her opening statement at the guilt phase, the prosecutor read the letter she had written to propose a plea bargain for Art Corona in exchange for his testimony. The letter stated the prosecutor's belief that "Mr. Corona will testify completely and truthfully at any and all trials in this matter." Defendant argues the prosecutor thus improperly personally vouched for the credibility of her star witness. (See e.g., *People v. Sully, supra,* 53 Cal.3d at p. 1235, 283 Cal.Rptr. 144, 812 P.2d 163; *People v. Gates* (1983) 43 Cal.3d 1168, 1187, 240 Cal.Rptr. 666, 743 P.2d 301.)

As he admitted *on the record* three days later, defendant did not object to this statement at the time it was made and did not request an admonition. Though he eventually objected to the evidence itself during the direct examination of Art Corona, his failure to object to the prosecutor's statement in a timely manner on the grounds sought to be raised on appeal bars the claim. This is not a situation in which an admonition could not have cured the harm. In any case, we do not think the jury would understand the remark as suggesting they should rely on the prosecutor's evaluation. (See *People v. Benson, supra,* 52 Cal.3d at p. 793, 276 Cal.Rptr. 827, 802 P.2d 330 [reviewing court must determine how reasonable juror would understand remarks].) As counsel said later in objecting to the evidence of the letter itself, the comment in the opening statement "went by so fast" that even he missed it at that time.

In any event, any misconduct was not prejudicial; the court and the prosecutor told the jury that the arguments of counsel are not evidence, and the matter of Corona's credibility was fully explored without any suggestion the jury should rely on the prosecutor's evaluation of his credibility.

In closing argument at the guilt phase, defendant claims the prosecutor committed misconduct in referring to defense witness Maxwell as a "weasel," in suggesting Norelli was a perjurer, in saying that defendant's witness Granara had referred to a police report that had not been produced and that he was not "following the script," in saying that defendant got caught in some lies, some "doozies," and in saying that his witnesses were "not strangers to the police department." These claims are meritless. The prosecutor is permitted to urge, in colorful terms, that defense witnesses are not entitled to credence, to comment on failure to produce logical evidence, to argue on the basis of inference from the evidence that a defense is fabricated, and to comment on the evidence of prior convictions attributable to defense witnesses. (See, e.g., *People v. Szeto* (1981) 29 Cal.3d 20, 34, 171 Cal.Rptr. 652, 623 P.2d 213; *People v. Adcox, supra,* 47 Cal.3d at 237, 253 Cal.Rptr. 55, 763 P.2d 906; *People v. Terry* (1962) 57 Cal.2d 538, 561-562, 21 Cal.Rptr. 185, 370 P.2d 985.)

Defendant claims the prosecutor referred in argument to matter outside the record, a practice that clearly is misconduct. (*People v. Benson, supra,* 52 Cal.3d at pp. 794-795, 276 Cal.Rptr. 827, 802 P.2d 330.) Her suggestion, that because jurors saw Darell Dorn and Terry Pinholster in the hallway together

during trial they should assume that Pinholster told Dorn to correct a misstatement in his testimony, was improper. But the inference that the alibi defense was fabricated arose naturally from the inconsistencies between the witnesses' earlier statements and their trial testimony, and from their relationships with the defendants, so we see no possibility of prejudice.

The prosecutor argued the alibi was incredible because none of the witnesses who gave evidence in support of it had attempted to exonerate defendant with the police or prosecutor before the trial, despite their familiarity with the police department and the prosecution. Defendant claims the reference to the familiarity of the witnesses with the police department was a reference to matter outside the record, namely, that the witnesses all had criminal records. Defendant failed to object, and in any event we do not think the comment would be understood this way. The trial testimony showed that seven of the ten alibi witnesses had been in contact with the police before trial but failed to mention the alibi. The argument, that the trial testimony of a witness other than the defendant is less credible for being offered for the first time at trial, is a permissible comment on the state of the evidence. (See, e.g., *People v. Szeto*, *supra*, 29 Cal.3d at p. 34, 171 Cal.Rptr. 652, 623 P.2d 213.) At worst, the argument used the underworld milieu of the witnesses to argue, somewhat unpersuasively in our opinion, that the witnesses' familiarity with the police department would lead them to present themselves to the police at the first possible moment to exonerate their arrested friend.

With respect to defendant's complaint about

the prosecutor's argument accusing *Brown's* attorney of bad faith in claiming the prosecutor had coached Corona to say that Brown had plunged his knife into his victim "up to the hilt," we see no possibility that this comment could have affected the jury with respect to *defendant's* case.

Defense counsel argued that if defendant had gotten to the police station first, he would have gotten the deal and Corona would have been prosecuted. The prosecutor rebutted this claim with the statement that this was "wishful thinking" and that the jury had heard why it was that Corona had gotten the deal. We see no impropriety in this rebuttal, based as it was on the record. Nor do we see impropriety in her rebuttal of the defendant's claim that there was a secret prosecutorial deal with Corona. The prosecutor was entitled to argue that if the defense thought there was such a deal, they could have called her, a logical witness, to the stand to examine her about it. (See *People v. Bell, supra,* 49 Cal.3d at p. 539, 262 Cal.Rptr. 1, 778 P.2d 129 [proper to comment on failure to call logical witness].)

Defendant also complains of the following: Codefendant Brown's counsel, in closing argument, attacked Corona's credibility and emphasized the accomplice corroboration rule. He told the jury if it ignored the instructions "you are really no better than Scott Pinholster, you have no more regard for the law or rights of anybody else or for our system than Scott Pinholster." Defendant did not object. The prosecutor repeated Brown's argument, and said, "To even mention your names in the same breath I find utterly an insult." There was no objection or request

for admonition. In any case, we do not view the argument as an appeal to passion and prejudice, but as within the range of forceful language warranted by the evidence. (See, e.g., *People v. Thornton* (1974) 11 Cal.3d 738, 762-763, 114 Cal.Rptr. 467, 523 P.2d 267; *People v. Terry, supra,* 57 Cal.2d at pp. 561-562, 21 Cal.Rptr. 185, 370 P.2d 985.)

Near the end of her rebuttal, the prosecutor argued that only in America are defendants accorded trials even in the face of overwhelming evidence. She said: "I've had rape trials where a man's been caught on top of a woman raping her and we are still in a trial. [¶] And you've all heard about trials where someone confessed, but that confession was beaten out of them. [¶] They are entitled to their trial and they have had it. It's time to put an end to this farce, ladies and gentlemen. It really, really is." Brown's counsel objected, and the objection was overruled. The sidebar conference was not reported, but at the conclusion of argument counsel repeated his objection and moved for a mistrial, and defendant's counsel joined. Brown's counsel argued that the prosecutor had made an improper appeal to passion and prejudice, had relied on matters outside the record in discussing other trials, and had suggested that the defendants did not deserve to have a trial.

Any suggestion that when there is overwhelming evidence of guilt, it is a farce to provide a trial is obviously improper. It may be that the jury understood the comment, as respondent claims, only as referring to the alibi and diminished capacity defenses as farcical in light of the overwhelming evidence of guilt. In any event, it is inconceivable that the improper comment was

prejudicial. It must have been clear to the jury that the court, the prosecutor and all defense counsel litigated the matter very carefully, that in no sense was the proceeding a farce or sham, that the jurors were expected to take their responsibilities carefully, and that all parties anticipated that the jurors would apply the law to the facts in arriving at their verdict. In addition, the jurors were specifically instructed that the statements of counsel were not evidence, and that they were not to be swayed by passion or prejudice. They were instructed that all parties had "a right to expect that you will conscientiously consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict regardless of what the consequences of such verdict may be." We find no prejudicial misconduct.

e. *Defendant's Marriage*

Defendant claims misconduct in the prosecutor's efforts to prevent his marriage to Cathy Smith. While the prosecutor did seek to delay the marriage until after trial in order to prevent the assertion of the marital privilege, she frankly admitted she had no authority to do so and her efforts were unsuccessful. Several months before trial the two were married. Smith testified against defendant nonetheless. We see no theory upon which defendant can argue prejudicial misconduct.

f. *Cumulative Prejudice*

We have identified no misconduct which, taken singly or together, convinces us that defendant was prejudiced, or, as defendant claims, subjected to an unfair trial in violation of his state and federal

constitutional rights to due process and a reliable determination of penalty. (See *People v. Bell, supra,* 49 Cal.3d at pp. 533-534, 262 Cal.Rptr. 1, 778 P.2d 129; *People v. Harris* (1989) 47 Cal.3d 1047, 1083-1084, 255 Cal.Rptr. 352, 767 P.2d 619.)

6. Instructional Error

a. *Sound Mind Instruction*

Defendant claims that an instruction that the jury should assume that he was "of sound mind at the time of his alleged conduct" (former CALJIC No. 3.34) amounted to a conclusive presumption that lightened the prosecutor's burden of proof on the element of specific intent applicable, he claims, to "most" of the charges against him, in violation of the due process clauses of the state and federal Constitutions.[12] He claims that the instruction interfered with the jury's consideration of his claim that because of drug and alcohol intoxication, he did not form the necessary specific intent. He argues that the instruction may have caused the jury to shift the burden of proof to him, and that it may have caused the jury to fail to consider the evidence at all, even in deciding whether there was any reasonable doubt on the element of intent.

Given the full spectrum of instruction on the issues of intent and voluntary intoxication, we find, as we have before, that it is not reasonably likely the jury would "have discerned in the presumption of

[12] The portion of CALJIC No. 3.34 that appellant complains of was withdrawn from the standard instruction in 1981.

mental soundness a presumption of sobriety." (*People v. Mickey* (1991) 54 Cal.3d 612, 671, 286 Cal.Rptr. 801, 818 P.2d 84; see also *People v. Kelly* (1992) 1 Cal.4th 495, 525-527, 3 Cal.Rptr.2d 677, 822 P.2d 385.) A "sound mind" does not convey to us, or to the reasonable juror, we think, the concept of sobriety. Rather, it conveys the absence of mental illness (see *People v. Gorshen* (1959) 51 Cal.2d 716, 729, 336 P.2d 492; former § 21, as enacted in 1872; see also *People v. Mickey, supra,* 54 Cal.3d at p. 670, 286 Cal.Rptr. 801, 818 P.2d 84.) Reading the instructions as a whole, as we must (*Francis v. Franklin* (1985) 471 U.S. 307, 315, 105 S.Ct. 1965, 1971, 85 L.Ed.2d 344; *Cupp v. Naughten* (1973) 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368), we think it is reasonably likely the jury would understand that the People had the burden of proving defendant's specific intent, and that while defendant's sanity for the purpose of proving specific intent was generally presumed, evidence of intoxication and abnormal physical condition was nonetheless relevant to raise a reasonable doubt whether specific intent had been proven.

b. *CALJIC No. 17.10*

Defendant claims the court erred in instructing the jury pursuant to CALJIC No. 17.10 (1982 rev.), because, he claims, the instruction told the jury that it could not consider the possibility that defendant committed only a lesser included offense until it unanimously decided that he was not guilty of the greater offense of murder in the first degree. Respondent claims invited error, since defendant requested the instruction, but there is little indication of a deliberate tactical purpose to focus the

jury on reaching a verdict on the first degree charges before they considered the lesser offenses. (Compare *People v. Hernandez, supra,* 47 Cal.3d at p. 353, 253 Cal.Rptr. 199, 763 P.2d 1289.)

Of course, a jury may consider the lesser offenses before returning a verdict on the greater offense, though it may not return a verdict on the lesser offense until it has agreed that defendant is not guilty of the greater offense. (*People v. Kurtzman* (1988) 46 Cal.3d 322, 329, 250 Cal.Rptr. 244, 758 P.2d 572.) Nonetheless, we have rejected defendant's argument in the context of CALJIC No. 8.75, finding that the jury would not be misled by the instruction. (*People v. Nicolaus* (1991) 54 Cal.3d 551, 580, 286 Cal.Rptr. 628, 817 P.2d 893; *People v. Hunter* (1989) 49 Cal.3d 957, 975-976, 264 Cal.Rptr. 367, 782 P.2d 608; *People v. Adcox, supra,* 47 Cal.3d at pp. 241-242, 253 Cal.Rptr. 55, 763 P.2d 906; *People v. Hernandez, supra,* 47 Cal.3d at pp. 352-353, 253 Cal.Rptr. 199, 763 P.2d 1289.)CALJIC No. 17.10, even in its 1982 form,[13] is even less likely to mislead, since it does not refer the jury to a series of deliberative decisions and verdict forms. (See *People v. Kurtzman, supra,* 46 Cal.3d at pp. 330-331, 250 Cal.Rptr. 244, 758 P.2d 572, see also *People v. Adcox, supra,* 47 Cal.3d at p. 242, 253 Cal.Rptr. 55, 763 P.2d 906.) We find nothing in the instruction or the record of the jury's deliberations to suggest the jury believed it must return a verdict on the greater offense before it could even discuss the lesser offenses. Accordingly we

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[13] Later editorial revisions do not, contrary to defendant's claim, force us to conclude that the 1982 version of the instruction was prejudicially misleading.

reject the claim that the giving of the instruction violated the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

c. *Comment on Complexity of Jury Instructions*

Both the trial court and the prosecutor commented to the jury on the length and complexity of the jury instructions. Defendant complains these comments produced basic misapprehensions about the importance of the jury instructions, in violation of his state and federal constitutional rights to due process, fundamental fairness, an unbiased jury, and a reliable determination of penalty.

Defendant's brief quotation takes the court's comment out of context and distorts it. The court said as it began to instruct the jury in the guilt phase of trial: "This is the time in the trial of the guilt phase of this matter for the court to read you the instructions. I am required by law to read these to you. It is not one of the real interesting and exciting ways to spend a morning, but it is of utmost importance. [¶] As I say, it is also required by law. [¶] You will find these instructions somewhat complex. Let me tell you in advance that I am going to give these instructions to you prior to your going into the jury room to deliberate. So when you do go into the jury room to deliberate, you will have the exact copy from which I have read. So you might want to consider the possibility of not taking notes during these readings because you will have the exact instructions in there. [¶] If it helps you to remember and focus on what we are doing here to take notes, obviously you are free to do that. [¶] *In my 16 years of dealing with criminal law in one part of it or another,*

I have never encountered a situation where it was necessary to give this many instructions. The most instructions that I have ever given ... is probably half this many. We have 110 pages of instructions. [¶] It is the process of working these instructions out that has occupied counsel and I during this relatively lengthy break between the taking of testimony and today. [¶] It is necessary under the law to give you these instructions. They address themselves and try to explain to you and define for you some pretty esoteric legal concepts. [¶] I will try to read them in a manner that will allow you to get some of the flavor and some of the feeling of what we are doing. [¶] I think the best thing to do, as I say, is just to try to listen and try to feel the flow of it and follow it in your mind and understand that you will have them present before you, and you will be able to study them at whatever length is necessary for your deliberations."

There is absolutely no merit to defendant's complaint that the italicized language "inevitably suggested that defendant's criminality here was twice as bad as any [the judge] had seen," or suggested that the jury was not expected to bother to understand or follow the instructions, in violation of his rights to due process, fundamental fairness and an unbiased jury. It is patently clear the court was soliciting the jury's patience and assiduity in trying to understand the volume of instructions.

Defendant also claims the prosecutor added to the court's "error" by telling the jurors not to be concerned if they did not understand all the instructions. She said: "You have all sat here today and listened to a bunch of instructions, I think the

court at various points called esoteric or difficult. [¶] I sat there listening and I had [them] in front of me, and even having heard them before they are confusing. They are. Not only to lay people, but people within the criminal justice system as well. Don't feel concerned if you don't understand any of them or only a few of them." Any suggestion that the jurors could proceed to judgment without *ever* understanding the instructions would be a gross misstatement of law, but, of course, the jurors were instructed to follow the law as stated by the judge, who had emphasized so carefully the importance of the instructions. The prosecutor herself, far from suggesting to the jury that the instructions could be ignored, spent a large proportion of her time in closing argument meticulously explaining the instructions and applying them one after the other to the evidence produced at trial. We see no error or possibility of harm to defendant.

D. *Special Circumstance Issues*

1. Intent to Kill

Defendant argues that the court gave confusing and ambiguous instructions on the issue of intent to kill. Defendant urges that because the evidence showed he might have been only an aider and abettor with respect to the murder of Johnson, the felony-murder special-circumstance allegations as to that killing can stand only if the jury found he had intent to kill. (*People v. Anderson, supra,* 43 Cal.3d at p. 1147, 240 Cal.Rptr. 585, 742 P.2d

1306.)[14] His complaint is not that the court failed to instruct on the point, but that the instructions given were confusing and ambiguous, in violation of his state and federal due process rights to fundamental fairness and a reliable determination of penalty.

The court instructed on the special circumstance allegations generally that: "If defendant Pinholster was not the actual killer, it must be proved beyond a reasonable doubt that he *intentionally aided,* abetted, counseled, commanded, induced, solicited, requested or assisted *the actual killer* in the murder of the first degree before you are permitted to find the alleged special circumstance of that first degree murder to be true as to defendant Pinholster."

Defendant complains that the italicized language would permit the jury to find the special circumstance allegations true without finding intent to kill, but finding, rather, only an intent to aid the actual killer in a nonhomicidal act. We have rejected defendant's reading of such instructions, finding that the reasonable juror would not interpret them as defendant suggests. (*People v. Sanders* (1990) 51 Cal.3d 471, 516-517, 273 Cal.Rptr. 537, 797 P.2d 561; *People v. Warren, supra,* 45 Cal.3d at pp. 487-488, 247 Cal.Rptr. 172, 754 P.2d 218; see also *People v. Beardslee* (1991) 53 Cal.3d 68, 91, 279 Cal.Rptr. 276, 806 P.2d 1311; *People v. Gallego* (1990) 52 Cal.3d

[14] Defendant makes the same claim with respect to the murder of Robert Beckett in a footnote, conceding, though, that the evidence was stronger that he was the actual killer of Beckett. We reject the claim because we find no error in the instructions.

115, 182, 276 Cal.Rptr. 679, 802 P.2d 169; *People v. Carrera, supra,* 49 Cal.3d at pp. 310-311, 261 Cal.Rptr. 348, 777 P.2d 121.)[15]

Defendant complains that additional misinstruction increased the risk that the jury would misunderstand its task in assessing his intent to kill. He points out that with respect to the multiple-murder special circumstance, the court instructed orally: "To find the special circumstances referred to in these instructions a multiple murder convictions to be true [sic], it must be proved ... that the defendant intended to kill or *aid and abet the killer* of at least one of the victims." We reject the claim. The court supplied the jury with the instructions in writing and noted their usefulness for deliberations. The written instruction on the multiple-murder special circumstance correctly used the word "killing" rather than "killer." The court clearly defined the necessary intent in instructing on the felony-murder special circumstances, stating as to each that the jury must find "that the defendant intended to kill or to aid in the *killing* ...." Viewing the instructions as a whole,

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[15] In *People v. Warren, supra,* 45 Cal.3d at page 486, 247 Cal.Rptr. 172, 754 P.2d 218, the instruction stated that "defendant was ... either the actual killer or a person who intentionally aided, abetted, counseled, commanded, induced, solicited, requested or assisted the actual killer in the commission of murder in the first degree." The instruction in *People v. Sanders, supra,* 51 Cal.3d at page 516, 273 Cal.Rptr. 537, 797 P.2d 561, was essentially the same. Despite defendant's claim, we fail to see how the addition of the term "commission of," found in the instruction in *Warren* and *Sanders* but not in the one read to the jury in this case, would make any difference to the jury's understanding of the charge.

we think no reasonable juror would conclude that a special circumstance allegation could be found true without proof that defendant, as an aider and abettor, had intent to kill. We find no error.

2. Multiple-murder Special Circumstances

As respondent concedes, it was error to charge and to allow the jury to find two multiple-murder special circumstances in this case. (*People v. Allen* (1986) 42 Cal.3d 1222, 1273, 232 Cal.Rptr. 849, 729 P.2d 115.) One of the findings must be set aside. We reject defendant's argument that the error violated his right to a fair and reliable penalty determination by an unbiased jury under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and parallel state constitutional provisions. "We have consistently found that an error of this nature is harmless." (*People v. Jones, supra,* 53 Cal.3d at p. 1149, 282 Cal.Rptr. 465, 811 P.2d 757; see also *People v. Gallego, supra,* 52 Cal.3d at p. 201, 276 Cal.Rptr. 679, 802 P.2d 169.) The prosecutor did not attempt to inflate the number of special circumstances in closing argument, or use the redundant special circumstance in arguing the predominance of aggravating over mitigating circumstances. We see no reasonable possibility of prejudice.

E. *Penalty Phase Issues*

1. Notice of Aggravating Evidence

Defendant contends he received inadequate notice of the evidence the prosecutor intended to present in aggravation at the penalty trial, in

violation of section 190.3 and in violation of his rights to due process and a fair and reliable determination of sentence under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The prosecutor stated that she sent a letter to defendant while he was in propria persona, giving him notice of the evidence to be presented in aggravation. Defendant contended at trial that he never received the letter; after an evidentiary hearing, the court found against him. Defendant renews his claim that he never received the letter, and argues for the first time that the letter was couched in general terms and was not specific enough to provide adequate notice, and that in any event the prosecutor called four witnesses whose testimony was in no way prefigured by the letter.[16]

Having reviewed the record, we accept the trial court's factual determination that defendant received the letter as supported by substantial evidence. Counsel never objected that any evidence introduced at the penalty trial was received in violation of defendant's right to notice under section 190.3, either on the ground that the notice was vague or that certain witnesses were not mentioned. Defendant's failure to object to the admission of evidence not mentioned in the letter means that any claim beyond the assertion that the prosecutor had not delivered the letter to defendant is not cognizable on appeal. (*People v. Carrera, supra,* 49 Cal.3d at p.

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[16] The four witnesses were Officers Taube, Kaufman and Guzman, and civilian witness Theodore Mesquita.

334, 261 Cal.Rptr. 348, 777 P.2d 121; see also *People v. Turner* (1990) 50 Cal.3d 668, 708, 268 Cal.Rptr. 706, 789 P.2d 887.)

Assuming that we should reach defendant's claims on the merits, we observe that " '[i]n the absence of any indication that the delay in the notice ... affected [counsel's handling of] prior proceedings,....' " the remedy for failure to provide adequate notice of evidence in aggravation is a continuance " 'as needed to allow defendant to develop a response.' " (*People v. Cooper, supra,* 53 Cal.3d at p. 842, 281 Cal.Rptr. 90, 809 P.2d 865, quoting *People v. Carrera, supra,* 49 Cal.3d at p. 334, 261 Cal.Rptr. 348, 777 P.2d 121.)

Defendant asks us to presume that counsel requested a continuance because of the court's failure to order all sidebar conferences reported. Our review of the record persuades us that we have an ample record upon which to determine whether there was a motion for continuance.

Counsel's objection to the notice in the first instance can only be characterized as halfhearted. His only claim was that he had no record that the People had served the requisite notice. He conceded that his predecessors as counsel might have received it. Once the prosecutor showed counsel a copy of the letter she had sent, counsel conceded that the normal rules of procedure would raise a presumption that defendant had received the notice, and counsel left the matter up to the court to handle. The court was solicitous and invited counsel to consider whether a continuance might be necessary. Because of the claimed deficiency of the record, we quote the record

in detail.

The court directed that they go off the record,[17] then returning to the record, observed that it had asked the jury to return on the following Monday. "The court has yet to resolve the issue as to whether or not sufficient notice was given to the defendant concerning additional evidence the prosecution is to present at that penalty phase. As I indicated off the record a moment ago, it strikes me if the court rules notice was not given, then we will proceed without the People having the opportunity to present additional evidence. [¶] If the defense presents no evidence on the issue of mitigation, then presumably both sides would argue based on what the jury heard during the course of the trial. [¶] *My question then would be to defense counsel, if the court should rule that there was sufficient notice given, and we are still inquiring into that, what would the defense position be with regard to proceeding.*" (Emphasis added.)

Defense counsel responded: "*I think we would probably still go forward on Monday. [¶] Clearly the one person that comes to mind is the defendant's mother. How much beyond that I don't know. [¶] I don't think the passage of time would make a great deal of difference.*" (Emphasis added.) The court then

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[17] This is the only unreported sidebar conference connected with the notice question. The settled statement shows that: "The subject of this conference was how to establish whether or not a 190.3 letter had been received and defense counsel's preparedness to proceed if the court ruled the district attorney could present such evidence. Beyond this, counsel are unable to add to what the existing record reflects."

made the following invitation: "We would continue to leave the Monday date, and *if between now [Tuesday] and Monday something material occurs to you that causes you to believe that is not satisfactory, obviously you will have leave to reopen that issue before the court and we can consider it.*" (Emphasis added.) While counsel reserved defendant's claim that he had not received the letter pending a hearing to determine that fact, counsel conceded that he would be able to proceed to the penalty trial if the court ruled against him. It is evident that defense counsel felt no need for a continuance.

When the matter was called on April 30, defense counsel did not make any objection to proceeding. Counsel did not move for continuance, or suggest that there had been inadequate time to prepare. Counsel did not object to any witness called by the prosecutor. In fact, counsel stipulated to defendant's various disciplinary infractions in state prison.

In the absence of evidence that the untimely notice affected earlier proceedings, the failure to request a continuance normally shows that any defect in the notice is not prejudicial. (*People v. Carrera, supra,* 49 Cal.3d at p. 334, 261 Cal.Rptr. 348, 777 P.2d 121, see also *People v. Cooper, supra,* 53 Cal.3d at p. 842, 281 Cal.Rptr. 90, 809 P.2d 865.) Defendant can point to no way in which his defense was "actually hampered" by the manner in which notice was given. (*People v. Turner, supra,* 50 Cal.3d at p. 709, 268 Cal.Rptr. 706, 789 P.2d 887.) There being absolutely no indication in this very complete record that defendant needed more time to develop a response, we see no reasonable possibility of

prejudice. (See *People v. Taylor* (1990) 52 Cal.3d 719, 737, 276 Cal.Rptr. 391, 801 P.2d 1142.)

Defendant argues that failure to move for continuance is not determinative in this context; it is only when the prosecutor's failure to give notice is excused by late discovery of the evidence, or when the notice is defective as to relatively minor penalty evidence, that defective notice can be excused. This is not the case; the question is whether there is any reasonable possibility that defendant was prejudiced. (*People v. Taylor, supra,* 52 Cal.3d at p. 737, 276 Cal.Rptr. 391, 801 P.2d 1142.) The purpose of the notice provision is to assure the accused of a reasonable opportunity to prepare a defense at the penalty trial. (*People v. Walker, supra,* 47 Cal.3d at p. 637, 253 Cal.Rptr. 863, 765 P.2d 70; *People v. Howard* (1988) 44 Cal.3d 375, 425, 243 Cal.Rptr. 842, 749 P.2d 279.) When there is no claim that late notice has either impaired preparation for the guilt trial or will impair the preparation of the defense at the penalty trial, and there has been no request for continuance, there can normally be no prejudice flowing from the late notice. Here, the prosecutor did deliver notice which, although general, gave an indication of the evidence to be introduced. In addition, defense counsel did not dispute the prosecutor's claim that she had given them actual notice of at least some of the evidence to be presented, and had opened her file to them. Finally, the court urged defense counsel to consider whether more time would be needed to prepare for the penalty trial. (Compare *People v. Jennings* (1988) 46 Cal.3d 963, 987, 251 Cal.Rptr. 278, 760 P.2d 475.) Under the

circumstances, we see no reasonable possibility of prejudice.[18]

2. Evidentiary Issues

a. *Testimony of Victims' Mothers*

Defendant contends his right to due process was violated when the trial court, during the guilt phase, refused to accept his stipulation to the identity of the victims as shown in proferred photographs in lieu of the identification testimony of the victims' mothers. He claims the evidentiary error was prejudicial because Mrs. Beckett wept when she saw her son's photograph. Respondent counters that the offer to stipulate was not explicit enough to fall under our holding in *People v. Bonin* (1989) 47 Cal.3d 808, 848-849, 254 Cal.Rptr. 298, 765 P.2d 460. In any event, any error could not have been prejudicial at the guilt phase, given the state of the evidence against defendant, and because the prosecutor did not mention the episode in her closing argument.

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[18] Defendant argues in a footnote that the court erred in making the implicit finding that the prosecutor could meet the notice requirement of section 190.3 by serving notice on defendant in propria persona without serving the notice again on counsel once they were appointed. This argument was not raised below. In any case, we disagree: "[a] defendant appearing in propria persona is held to the same standard of knowledge of law and procedure as is an attorney." (*People v. Clark, supra,* 50 Cal.3d at p. 625, 268 Cal.Rptr. 399, 789 P.2d 127.) Further, it is defense counsel's obligation to secure from the defendant who represented himself all materials served on him during the period of self-representation.

Defendant's primary contention seems to be that the error was prejudicial at the penalty phase under *Booth v. Maryland* (1987) 482 U.S. 496, 503-506, 107 S.Ct. 2529, 2533-2535, 96 L.Ed.2d 440, and *South Carolina v. Gathers* (1989) 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876. Of course, this authority has since been reconsidered. (*Payne v. Tennessee* (1991) 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720.) A majority of this court has determined that " 'evidence of the specific harm caused by the defendant,' " including evidence of impact on the family of the victim, is admissible under factor (a) of section 190.3. (*People v. Edwards, supra,* 54 Cal.3d at p. 833, 1 Cal.Rptr.2d 696, 819 P.2d 436, quoting *Payne v. Tennessee, supra,* 501 U.S. at p. ----, 111 S.Ct. at p. 2608.) Here, neither the evidence itself nor the prosecutor's argument suggested that " 'emotion may reign over reason' " or that irrational, purely subjective responses should carry the day. (*People v. Edwards, supra,* 54 Cal.3d at p. 836, 1 Cal.Rptr.2d 696, 819 P.2d 436.) The witness's emotion was quickly controlled, and the prosecutor did not refer to it in argument. Thus, assuming for the purpose of discussion that there was an abuse of discretion at the guilt trial, we see no possibility of prejudice at the penalty trial.

b. *Juvenile Misconduct*

Defendant contends that evidence of his juvenile misconduct was inadmissible at the penalty trial, as it did not fall within the definition of prior criminal activity expressed in section 190.3, factor (b). He apparently refers to evidence of his courtroom assault on a bailiff during a juvenile proceeding. We

have held, however, that violent criminal activity of a juvenile is admissible under section 190.3, factor (b). (*People v. Burton* (1989) 48 Cal.3d 843, 862, 258 Cal.Rptr. 184, 771 P.2d 1270.) In any case, defendant's failure to object to the admission of the evidence bars our consideration of the issue on appeal. It also bars our consideration of his further, conclusory argument that admission of the evidence was a violation of his Fifth, Eighth and Fourteenth Amendment rights to a penalty phase determination based upon suitably limited criteria, citing *Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, and that reliance on such evidence is a violation of the state and federal prohibitions against cruel and unusual punishment, citing *Thompson v. Oklahoma* (1988) 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702. The general rule that any claim regarding the admissibility of evidence will not be reviewed on appeal unless there was a specific objection on the ground raised is applicable in capital cases. (*People v. Poggi, supra,* 45 Cal.3d at p. 331, 246 Cal.Rptr. 886, 753 P.2d 1082; see also *People v. Gordon, supra,* 50 Cal.3d at p. 1240, fn. 2, 270 Cal.Rptr. 451, 792 P.2d 251; *People v. Mattson* (1990) 50 Cal.3d 826, 853-854, 268 Cal.Rptr. 802, 789 P.2d 983.) In any event, defendant's reliance on *Thompson v. Oklahoma, supra,* 487 U.S. 815, 108 S.Ct. 2687, is misplaced. (*People v. Cox, supra,* 53 Cal.3d at p. 689, 280 Cal.Rptr. 692, 809 P.2d 351.)

c. *Boyd Error*

In *People v. Boyd* (1985) 38 Cal.3d 762, 776, 215 Cal.Rptr. 1, 700 P.2d 782, we held that section 190.3 "expressly excludes evidence of criminal activity, except for felony convictions, which activity

'did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence.' " (Fn. omitted.) Defendant contends that much of the evidence offered against him at the penalty trial transgressed this rule.

The claim is barred by defendant's failure to object below. (*People v. Clark, supra,* 50 Cal.3d at p. 624, 268 Cal.Rptr. 399, 789 P.2d 127.) We have held that it is not an unreasonable burden to require parties to object on the ground raised here even in advance of our decision in *Boyd, supra,* 38 Cal.3d at page 776, 215 Cal.Rptr. 1, 700 P.2d 782.(*People v. Clark, supra,* 50 Cal.3d at p. 624, 268 Cal.Rptr. 399, 789 P.2d 127.) While it was necessary for us to explain in *Boyd* that the statutory language does not permit evidence of violent injury to property, the express language of the statute made it clear that criminal activity not involving force or violence is inadmissible. As we explained: "In the face of an express statutory command governing the admissibility of evidence a party may not complain that failure to object is excused because he could not be held to anticipate a judicial decision holding that the statute means just what it says, but limits its application. This is not a situation in which an unreasonable burden is placed on a party by expecting him to understand the meaning of a statute or in which because of prior controlling law an objection would have been futile and is therefore excused." (*People v. Clark, supra,* 50 Cal.3d at p. 625, 268 Cal.Rptr. 399, 789 P.2d 127; compare *People v. Gordon, supra,* 50 Cal.3d at p. 1266, 270 Cal.Rptr. 451, 792 P.2d 251 [failure to object to prosecutorial argument regarding sympathy for the victim

excused, since case tried before *People v. Boyd, supra,* 38 Cal.3d 762, 215 Cal.Rptr. 1, 700 P.2d 782, and *South Carolina v. Gathers, supra,* 490 U.S. 805, 109 S.Ct. 2207].)[19]

Even if we were to reach the merits of the claim, we see no prejudicial error. Defendant complains that the evidence of his outburst in juvenile court, of his conduct during two arrests, and much of his misconduct in jail awaiting trial was not admissible. But he admits that "on some theoretical level, some of these activities may arguably constitute assault or battery." As we read it, the record is rife with examples of actual assault and battery and violent interference with an officer in the course of his duties (§§ 69, 240, 242.) During the juvenile proceeding, defendant struck the bailiff. He kicked Officer Kaufman in the head during an arrest. Officer Guzman testified that while he was transporting defendant to the station, defendant tried to kick him in the head and succeeded in kicking Guzman's partner in the leg. Deputy Sheriff Loper testified that defendant kneed him in the groin as Loper tried to restrain him. Deputy Sheriff Piggott

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[19] In a footnote, defendant contends the court erred in refusing to instruct that evidence of conduct not amounting to violent crime is not admissible in aggravation. We have recently said that the standard instruction in the terms of the statute adequately conveys this idea. (*People v. Hayes* (1990) 52 Cal.3d 577, 639-640, 276 Cal.Rptr. 874, 802 P.2d 376.) This suggestion is consistent with our decision in *People v. Clark, supra,* 50 Cal.3d at page 624, 268 Cal.Rptr. 399, 789 P.2d 127, that the statutory language itself clearly states this concept. We reject defendant's claim.

testified that defendant struck another inmate in the head and ribs, and struck another deputy. We agree with respondent that throwing a cup of urine in a person's face is a battery, since "[a]ny harmful or offensive touching constitutes an unlawful use of force or violence" and thus a battery under section 243. (*People v. Martinez* (1970) 3 Cal.App.3d 886, 889, 83 Cal.Rptr. 914.) Of course the circumstances surrounding the violent offenses may be described without violating the statute; the conduct may be presented "in context, so that the jury has [a] full opportunity, in deciding the appropriate penalty, to determine its seriousness." (*People v. Melton* (1988) 44 Cal.3d 713, 757, 244 Cal.Rptr. 867, 750 P.2d 741.) Further, "all crimes committed during a continuous course of criminal activity which includes the use of force or violence may be considered in aggravation even if some portions thereof, in isolation, may be nonviolent." (*People v. Cooper, supra,* 53 Cal.3d at p. 841, 281 Cal.Rptr. 90, 809 P.2d 865.)

We are left with the following evidence that is arguably inadmissible under *Boyd, supra,* 38 Cal.3d 762, 215 Cal.Rptr. 1, 700 P.2d 782: (1) Officer Taube's testimony that defendant was involved in gang activities and that Taube had difficulty supervising him; (2) Deputy Sheriff Piggott's testimony regarding defendant's disciplinary violations in county jail other than assaults, Piggott's testimony regarding defendant's placement in administrative segregation, Piggott's opinion that defendant was probably one of the two or three most violent inmates at the facility, and Piggott's testimony that defendant did not reform as a result of disciplinary measures and that defendant told him that if he were not sent to state prison he would "go

out on the streets and do something to get back in;" (3) Deputy Loper's testimony that defendant had a tendency to threaten people, and that defendant had threatened other, "mainly black" inmates; (4) Deputy Barrett's testimony that defendant said he was so "mad" he would have to kill Art Corona upon defendant's release from prison, and that defendant said he thought he would serve little prison time on the offenses charged in this case; and (5) the stipulation as to defendant's disciplinary history in state prison.

The prosecutor did make use of the challenged evidence in her penalty phase argument, most particularly arguing against the sentence of life without possibility of parole because of defendant's statement that he would kill Art Corona-she conveyed the impression that it would be possible for defendant to carry out this threat while in prison. In addition, referring to his juvenile, jail, and prison records, she argued that he could not be rehabilitated. She said: "He will continue his marauding in the state prison system. He will continue assaulting, he will continue the exact same type of behavior he's engaged in recently and all his life." She properly argued the evidence of his prior crimes of violence, but also drew from the evidence the argument that defendant "doesn't like authority," that his behavior did not improve when he was in prison, and that his spitting and kicking show "he's a lovely person." She argued the evidence of defendant's behavior in county jail pending trial: "While he's been in jail for the past 27 months awaiting trial for a double murder, did he try to get his act together: Did he undergo classes, try to do anything to rehabilitate himself? No. He's known for

kicking, spitting, assaulting, threatening other inmates and deputies and of throwing urine on deputies.... What kind of person are we dealing with here? According to Sergeant Piggott, we are dealing with what he terms is one of the two or three most violent inmates in county jail, a jail that on any given day has 6,000 people going through. That's what we are dealing with here."

In *People v. Wright, supra,* 52 Cal.3d at page 426, 276 Cal.Rptr. 731, 802 P.2d 221, we commented that we had never reversed a penalty verdict for *Boyd* error alone. We pointed out that we have found nonprejudicial the erroneous admission of nonviolent juvenile adjudications, threats to kill a police officer, a threat to a prison guard, instigation of a food riot, threats of sexual and other violence, evidence of failure to reform, numerous other threats of violence, and manipulative behavior on parole. (*Ibid.*, and cases cited.) Here, the properly admitted evidence of assaults on court staff, police officers, deputy sheriffs, and other inmates clearly conveyed the impression defendant complains of that he was an intractable person who was not a good candidate for rehabilitation. We are not particularly disturbed by the inadmissible evidence relating to his conduct in jail, since admissible evidence of his assaults and batteries gave a clear enough picture of this. Defendant's own testimony depicted him as an unregenerate career criminal. Thus we find clearly nonprejudicial the opinion testimony that defendant was not subject to rehabilitation and that he was one of the most violent prisoners in the county jail. The evidence of defendant's threat to kill Art Corona could have been no surprise to the jury after the guilt phase evidence to that effect, and the jury was

entitled to consider the threat to Corona as a circumstance of the charged crimes. Finally, the evidence of the charged offenses showed a violent nature. (See *id.* at p. 429, 276 Cal.Rptr. 731, 802 P.2d 221.)

In light of the circumstances of the charged crimes and the volume of evidence of prior criminal activity that was properly admitted, there can be no reasonable possibility that any improperly admitted evidence was prejudicial.[20]

3. *Prosecutorial Misconduct*

Defendant claims the prosecutor committed misconduct in making the following argument to the jury: "If you spare [defendant's] life will it be at the expense of someone else's? If he has life without the possibility of parole, what's he going to do to the other deputies and inmates in whatever prison he goes to?" A little while later she said: "I say to you if there is one redeeming factor in this defendant's past or present life, or if you can even envision a redeeming factor occurring in the future, then spare his life. I don't believe Scott Pinholster could be rehabilitated or lead any kind of a useful life. [¶] His past and present, I think, have amply demonstrated that. [¶] He will continue his marauding in the state

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[20] We reject defendant's conclusory claim that the admission of this evidence violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (See, e.g., *People v. Benson, supra,* 52 Cal.3d at p. 789, 276 Cal.Rptr. 827, 802 P.2d 330;*People v. Balderas, supra,* 41 Cal.3d at pp. 204-205, 222 Cal.Rptr. 184, 711 P.2d 480.)

prison system. He will continue assaulting, he will continue the exact same type of behavior he's engaged in recently and all his life."

There was no objection or request for admonition, and this bars our consideration of the issue. (*People v. Bell, supra,* 49 Cal.3d at pp. 547-548, 262 Cal.Rptr. 1, 778 P.2d 129.) Even if we were to reach the merits, defendant's claim fails. Defendant objects to the reference to his future dangerousness; we have approved such argument. (*People v. Bell, supra,* 49 Cal.3d at pp. 548-550, 262 Cal.Rptr. 1, 778 P.2d 129; *People v. Adcox, supra,* 47 Cal.3d at pp. 258-259, 253 Cal.Rptr. 55, 763 P.2d 906.) Nor do we consider the argument inflammatory, as defendant claims, or as a comment on the prosecutor's personal belief in defendant's guilt. Rather, the prosecutor clearly was arguing on the basis of the evidence that defendant deserved the death penalty under the statutory scheme.

Defendant also claims the following argument was misconduct: "What mitigating circumstances were presented? Nothing except a mother who loves her son. Even the most heinous person born, even Adolph Hitler, probably had a mother who loved him." There was no objection and request for admonition. (See *People v. Poggi, supra,* 45 Cal.3d at p. 335, 246 Cal.Rptr. 886, 753 P.2d 1082.) Even if we were to reach the merits, we do not see this comment as an attempt to revive the issue of Nazism and gang membership at the penalty trial. Rather, we think the reasonable juror would understand the comment as attempting to diminish the weight of defendant's evidence in mitigation, that is, the evidence of his mother's attachment to him. (See *People v. Adcox,*

supra, 47 Cal.3d at p. 259, 253 Cal.Rptr. 55, 763 P.2d 906.)

Defendant claims the prosecutor purposely elicited inadmissible statements from two of her witnesses at the penalty trial. While it is misconduct for a prosecutor to " 'intentionally elicit inadmissible testimony' " (*People v. Bonin*, *supra*, 46 Cal.3d at p. 689, 250 Cal.Rptr. 687, 758 P.2d 1217), we see little evidence of such conduct here. In response to the suggestion on cross-examination of juvenile probation officer Taube that he had not made enough effort to rehabilitate defendant, the prosecutor asked how often Taube had met with defendant. The witness had met with defendant weekly. The prosecutor asked "Did you at any point in time during these meetings or prior to these meetings form an opinion as to whether he would be amenable to your supervision." The question called for a "yes" or "no" answer. The witness answered: "Well, it's-I knew one thing that I did have a lot of difficulty supervising him, because his activities were *into gang type activities*, and you know that you are going to have some problems in this area, and so you kind of keep an eye out on that person." The narrative answer and the italicized language went beyond the prosecutor's question.

The second example given is of the examination of Deputy Sheriff Loper, who described defendant's attack on him and other deputies at the county jail. The deputy said he had numerous "run-ins" with defendant. After he described one such incident, this exchange followed: "Any other episodes that you recall involving acts of violence, sir? A: He used to have a tendency to threaten people. Q: Were

you ever witness to those threats? A: No. I've talked to him before, and he's told me he has threatened other inmates, *mostly black,* but I've talked to him before and he's already been pretty open when he's talking to a lot of the deputies about his own feelings."

Defendant failed to object or ask for an admonition in either instance. We agree with respondent that there is no indication the prosecutor purposely elicited the emphasized responses; rather, she was pursuing legitimate lines of inquiry.

Defendant complains that the prosecutor committed misconduct in not serving the notice of evidence in aggravation required by section 190.3 on the defense attorneys before trial. But, as we have seen, the district attorney did send the required notice to defendant, who was then acting as his own counsel. Defendant had the obligation to turn over to his counsel any matter relevant to their representation of him. Counsel did not argue at the trial that the prosecutor had a duty to re-serve them when they were appointed some four months after she sent the letter to defendant. Defendant has provided no authority to that effect and, in any case, as we have found, counsel's failure to request a continuance or object to the testimony of any witness demonstrates that the late notice was not prejudicial.[21]

[21] Defendant complains that counsel's failure to move for continuance was ineffective assistance of counsel, but says he will address the argument in his anticipated petition for writ of habeas corpus.

4. *Instructional Error*

a. *Reasonable Doubt Instruction*

The trial court erred, as respondent concedes, in failing to instruct that allegations of unadjudicated prior criminal acts must be proved true beyond a reasonable doubt before they can be relied upon in the penalty determination. (*People v. Gates, supra,* 43 Cal.3d at p. 1202, 240 Cal.Rptr. 666, 743 P.2d 301; *People v. Robertson* (1982) 33 Cal.3d 21, 53, 188 Cal.Rptr. 77, 655 P.2d 279.)[22] Of course, the instruction is not required as to proof of a prior felony conviction. (*People v. Wright, supra,* 52 Cal.3d at p. 437, 276 Cal.Rptr. 731, 802 P.2d 221; *People v. Morales* (1989) 48 Cal.3d 527, 566, 257 Cal.Rptr. 64, 770 P.2d 244.) We have frequently determined that the absence of the instruction is not prejudicial when the evidence of defendant's commission of a violent crime is uncontroverted. (*People v. Morales, supra,* 48 Cal.3d at p. 566, 257 Cal.Rptr. 64, 770 P.2d 244; *People v. Ainsworth, supra,* 45 Cal.3d at p. 1031, 248 Cal.Rptr. 568, 755 P.2d 1017; *People v. Miranda, supra,* 44 Cal.3d at pp. 97-98, 241 Cal.Rptr. 594, 744 P.2d 1127; *People v. Gates, supra,* 43 Cal.3d 1168, 1202, 240 Cal.Rptr. 666, 743 P.2d 301.) We have also said that when evidence of prior activity not amounting to a violent

[22] We must reject defendant's federal constitutional arguments regarding the failure to give this instruction, since, as we have held, the duty to give the instruction is not constitutionally based. (*People v. Benson, supra,* 52 Cal.3d at pp. 810-811, 276 Cal.Rptr. 827, 802 P.2d 330;*People v. Miranda, supra,* 44 Cal.3d at p. 98, 241 Cal.Rptr. 594, 744 P.2d 1127.)

crime is admitted in violation of *Boyd, supra,* 38 Cal.3d 762, 215 Cal.Rptr. 1, 700 P.2d 782, if its admission is not prejudicial it follows that failure to instruct under *Robertson, supra,* 33 Cal.3d 21, 188 Cal.Rptr. 77, 655 P.2d 279, is not prejudicial as to that evidence. (*People v. Wright, supra,* 52 Cal.3d 367, 438, 276 Cal.Rptr. 731, 802 P.2d 221.)

Defendant argues that there was some evidence upon which to base a reasonable doubt of his guilt of the various assaults the jury heard about at the penalty trial. He argues that with respect to the evidence of his assaults on Los Angeles Police Officers Kaufman and Guzman, and on his wife, there was some evidence that he had epileptic seizures during those episodes. This could have raised a question of diminished capacity, as could defendant's mother's testimony regarding defendant's head injuries and diagnosis of epilepsy. But as respondent points out, with respect to Kaufman and Guzman, the evidence was that the assaults occurred after defendant's recovery from the seizures. There was no expert evidence suggesting a causal connection between the seizures and any act of violence. Vague and general evidence of epilepsy from a layperson hardly suggests justification or excuse for any particular assault. With respect to the attack on Cathy Smith, the evidence was that defendant struck her in anger, and there was no substantial evidence that the physical assault which she said occurred during the seizure was involuntary.

With respect to the evidence of defendant's attack on witness Mesquita, since Mesquita initiated the fight, defendant argues that a significant issue of self-defense arose. However, any right of self-defense

is limited to the use of such force as is reasonable under the circumstances. (*People v. Clark* (1982) 130 Cal.App.3d 371, 380, 181 Cal.Rptr. 682.) The right of self-defense did not provide defendant with any justification or excuse for using deadly force to repel a nonlethal attack. (*Ibid.*) Further, the right of self-defense does extend beyond the time of real or apparent danger; once Mesquita fled, the right of self-defense did not excuse defendant's conduct. (See *People v. Parrish* (1985) 170 Cal.App.3d 336, 352, 217 Cal.Rptr. 700; *People v. Evans* (1969) 2 Cal.App.3d 877, 882, 82 Cal.Rptr. 877; 1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) Defenses, § 246, p. 282.)

With respect to Deputy Sheriff Piggott's testimony regarding defendant's fights and assaults in jail, since Piggott had no personal knowledge of the events, but merely related the contents of defendant's file, defendant complains simply that the evidence was weak. Given the scope of the penalty phase evidence, however, we do not find a reasonable possibility that a properly instructed jury would have reached a different penalty determination.

In addition, Piggott testified to numerous infractions that did not appear to involve the actual commission of a crime. Defendant complains that the court's failure to instruct on the elements of any offenses that may have been shown by the evidence made the failure to instruct on reasonable doubt more prejudicial. Failure to instruct on elements, however, is not error, in the absence of a request from defendant. (*People v. Melton, supra,* 44 Cal.3d at p. 755, 244 Cal.Rptr. 867, 750 P.2d 741.) As we have seen, the evidence of jailhouse assaults was uncontroverted, and we see no reasonable possibility

that failure to instruct on reasonable doubt with respect to these offenses was prejudicial to defendant. (See *People v. Wright, supra,* 52 Cal.3d at p. 438, 276 Cal.Rptr. 731, 802 P.2d 221.)

Defendant also directs our attention to evidence from the guilt phase of trial that may have been used by the jury at the penalty phase to show prior crimes of violence. He points in particular to the statement of Art Corona to the police, suggesting that defendant was involved in another double homicide, an assault on an elderly woman, and robbery. Defendant also points to guilt phase evidence that defendant stuck a knife through a witness's door, that he threatened to kill Corona, that he had been involved in a previous shootout over a drug theft, and that he had "gotten away with something like this before."[23]

We have said that the reasonable doubt instruction is required when other-crimes evidence is used in aggravation at the penalty trial, but that when the evidence is admitted at the guilt phase and is not referred to at the penalty trial, the reasonable doubt instruction is not required. (*People v. Rich* (1988) 45 Cal.3d 1036, 1121, 248 Cal.Rptr. 510, 755 P.2d 960; see also *People v. Morales, supra,* 48 Cal.3d at p. 566, 257 Cal.Rptr. 64, 770 P.2d 244.) In discussing factor (b) of section 190.3, the prosecutor referred the jury to the penalty phase evidence alone. Accordingly the statement of Art Corona, to which the prosecutor did not refer at any point in her penalty phase argument, did not give rise to a duty to

[23] The last statement was stricken by the trial court and would not have been considered.

instruct on reasonable doubt.[24] The evidence that defendant stabbed a door with a knife was admissible as a circumstance of the charged offense, and thus was independently admissible under factor (a). (*People v. Ainsworth, supra,* 45 Cal.3d at p. 1031, 248 Cal.Rptr. 568, 755 P.2d 1017; see also *People v. Morales, supra,* 48 Cal.3d at p. 566, 257 Cal.Rptr. 64, 770 P.2d 244.)

Defendant also refers to testimony of Eric Klemetti at the guilt trial that he and defendant had been "busted for burglary." Again, this was not referred to at the penalty trial and was elicited by defense counsel for an entirely different purpose, that is, to impeach Klemetti's credibility.

Defendant also refers us to his own testimony that he had committed "hundreds" of armed robberies of drug dealers. Again, this testimony was proffered to enhance the credibility of defendant's denial that he committed this particular offense. It was essentially a strange variety of good character evidence and, in any case, was uncontroverted.

The prosecutor did refer to defendant's threat

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[24] Defendant claims the jury must have considered in the penalty determination the evidence of his prior crimes of violence contained in Art Corona's statement to the police, since the jurors asked for the transcript of Corona's statement during penalty deliberations. There is nothing to indicate that their request indicated an interest in the other-crimes evidence, as opposed to some other part of Corona's statement, in any case, they cancelled the request before they received the transcript, having reached a verdict.

to kill Art Corona in her penalty phase argument, but not in the context of factor (b) of section 190.3. She used the threat in an attempt to anticipate defendant's argument that his crime was not as heinous as other infamous criminals whose lives had been spared. She argued not that the threat was prior violent criminal activity under factor (b), but that Corona would not be safe unless the jury imposed the death penalty: "He was planning to murder Art Corona. Rest assured if he had the chance he would. [¶] So is life without possibility of parole right for him? If you spare his life, will it be at the expense of someone else's?" The reasonable doubt instruction would not have been helpful to the jury in evaluating the evidence.

b. *Brown Error*

Defendant claims that the giving of the instruction that "If you conclude the aggravating circumstances outweigh the mitigating circumstances, you shall impose the sentence of death," combined with the prosecutor's closing argument and the language of the penalty verdict forms, misled the jury as to its sentencing function, citing *People v. Brown* (1985) 40 Cal.3d 512, 542, 230 Cal.Rptr. 834, 726 P.2d 516, reversed on other grounds *sub nomine California v. Brown* (1987) 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934. He claims that the risk the jury was misled was enhanced because the quoted instruction was given separate from the other instructions, after the closing arguments of counsel.

In those cases in which the potentially misleading instruction complained of here is given,

"we examine the record to determine whether the jury might have been misled to the defendant's prejudice about the scope of its sentencing discretion." (*People v. Jones, supra,* 53 Cal.3d at p. 1147, 282 Cal.Rptr. 465, 811 P.2d 757.)

Any risk that the jury engaged in mechanical counting of aggravating factors was dispelled by the court's special instruction directing the jury not to approach the penalty determination in this way.[25] The special instructions also made it clear that the jury's task was to determine the appropriate punishment. (Compare *People v. Cooper, supra,* 53 Cal.3d at p. 845, 281 Cal.Rptr. 90, 809 P.2d 865.) The court also instructed that in determining the sentence, the jury could "decide to exercise mercy on behalf of the defendant" and that the guilt phase admonition not to be swayed by sympathy or pity no longer applied. These instructions made it highly unlikely the jury would think itself compelled to return a death verdict without being convinced that death was appropriate. (*People v. Jones, supra,* 53 Cal.3d at p. 1148, 282 Cal.Rptr. 465, 811 P.2d 757;

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[25] The instruction stated: "Within the broad categories of aggravation and mitigation, the law of this state does not place any specific weight or numerical value on any particular aggravating or mitigating circumstance. It is entirely up to you to determine whether in your independent opinion one or more factors outweighs others, no matter what their number. [¶] In weighing the aggravating and mitigating factors, you are not to merely count the numbers on either side. One mitigating circumstance may be sufficient to support a decision that death is not the appropriate punishment in this case. [¶] The weight you each give to any factor is for you individually to decide."

People v. Ramirez, supra, 50 Cal.3d at p. 1200, 270 Cal.Rptr. 286, 791 P.2d 965.) We also assume the jury considered the instructions as a whole, as they were instructed to do. Thus we are not persuaded by defendant's argument that the timing of the instruction made any difference to the jury's understanding of its task, particularly since the jury had all the instructions before it in writing during deliberations.

Defendant points to the following argument of the prosecutor: "Your job is made, I know it's hard, but it's made easy by the instruction you will get before you retire to deliberate. This is if you conclude the aggravating circumstances outweigh the mitigating circumstances, you shall impose the sentence of death. [¶] However, if you determing [*sic*] the mitigating circumstances outweigh the aggravating circumstances, you may impose sentence of confinement in state prison without the possibility of parole. [¶] What mitigating circumstances were presented? Nothing except a mother who loves her son. Even the most heinous person born, even Adoph Hitler probably had a mother who loved him. [¶] If you were to put the aggravating and mitigating on a scale, I would suggest the scales would be so tipped it would be incredible. Just incredible."

We do not think the prosecutor's argument misled the jury. It "did not argue that death was mandatory, or denigrate the jury's role in making a normative decision about the appropriate penalty." (*People v. Pensinger, supra,* 52 Cal.3d at p. 1265, 278 Cal.Rptr. 640, 805 P.2d 899.) The reference to a scale did not suggest the jury should simply count the factors (see *People v. Hendricks* (1988) 44 Cal.3d 635,

652, 244 Cal.Rptr. 181, 749 P.2d 836), especially in light of the court's curative instructions. (See *People v. McDowell* (1988) 46 Cal.3d 551, 576, 250 Cal.Rptr. 530, 763 P.2d 1269.) The prosecutor concluded by directing the jury to spare defendant's life if they found "one redeeming factor" in his past, present or future, but informing them that her view was that death was the "only just verdict." We see no possibility the prosecutor's argument to the jury caused it to misinterpret the court's instructions.

We are also not persuaded that the verdict forms misled the jury in the penalty determination. Defendant complains that the verdict forms directed the jury to weigh the factors without directing it to determine the appropriateness of death in a separate process. This is not error. (*People v. Boyde, supra,* 46 Cal.3d at pp. 253-254, 250 Cal.Rptr. 83, 758 P.2d 25; *People v. Hendricks, supra,* 44 Cal.3d at p. 655, 244 Cal.Rptr. 181, 749 P.2d 836.)

Because we do not agree that the jury was misled into believing that its task was in any way mechanical, or that the penalty determination was to be made without regard to the jury's normative decision regarding the appropriateness of the penalty, we cannot agree that the instructions given violated the Eighth Amendment or defendant's rights to due process and a fair and reliable determination of penalty under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. (*People v. Mickey, supra,* 54 Cal.3d at p. 700 and fn. 19, 286 Cal.Rptr. 801, 818 P.2d 84.)

5. Excessive Special Circumstances

Defendant argues that not only were the two multiple-murder special circumstances duplicative, but also that the two burglary-murder and robbery-murder special circumstances were duplicative under the reasoning of *People v. Harris* (1984) 36 Cal.3d 36, 64-67, 201 Cal.Rptr. 782, 679 P.2d 433. He argues not that there should be a merger of a robbery-murder special circumstances and a burglary-murder special circumstance under section 654, but that under section 654 there was only one robbery-murder special circumstance and only one burglary-murder special circumstance. We have rejected the general reasoning of *Harris* on which defendant relies. (*People v. Melton, supra,* 44 Cal.3d at p. 766, 244 Cal.Rptr. 867, 750 P.2d 741.) As we said regarding the specific argument raised here in *People v. Andrews, supra,* 49 Cal.3d 200, 260 Cal.Rptr. 583, 776 P.2d 285, rejecting the argument in the context of multiple robbery-murder special circumstances: "It is of no significance that each murder occurred in the course of the same robbery.... When a defendant entertains a single principal objective during an indivisible course of conduct, he may nonetheless be punished for multiple convictions if during the course of that conduct he committed crimes of violence against different victims." (*Id.* at p. 225, 260 Cal.Rptr. 583, 776 P.2d 285.) The same reasoning applies to multiple burglary-murder special circumstances alleged in connection with a multiple murder. Accordingly, we must reject defendant's claim, that the trial court's failure to instruct the jury to disregard what he terms the duplicative special circumstances violated due process under the state and federal Constitutions and created an unreliable

penalty determination in violation of the Eighth Amendment and article I, section 17 of the California Constitution.

6. *Proportionality*

Defendant argues that it is a violation of the Eighth Amendment and our state constitutional proscription against cruel and unusual punishment to impose the death penalty against him. He argues that the decision to seek the death penalty against him and not against codefendant Brown was based on inaccurate and unreliable information about their involvement in the crime and their criminal records. He claims the prosecutor was under the misapprehension that he had been solely responsible for the murders; and that his criminal record was worse than Brown's.

We do not normally review the charging decisions of prosecutors unless there is invidious discrimination in charging (see Gov.Code, § 26501; *People v. Morris, supra,* 53 Cal.3d at p. 235, fn. 25, 279 Cal.Rptr. 720, 807 P.2d 949; *People v. Keenan, supra,* 46 Cal.3d 478, 506-507, 250 Cal.Rptr. 550, 758 P.2d 1081; *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 297, 124 Cal.Rptr. 204, 540 P.2d 44; *People v. Vatelli* (1971) 15 Cal.App.3d 54, 58-59, 92 Cal.Rptr. 763); none is claimed here. Defendant claims his punishment is disproportionate because the charging decision was based on inaccurate information, but the issue is not the information upon which the charging decision was made, but the evidence produced at trial.

We rejected a similar claim in *People v.*

Sanders, supra, 51 Cal.3d 471, 273 Cal.Rptr. 537, 797 P.2d 561. There the prosecutor sought the death penalty against only one of two jointly charged defendants. We commented that although the evidence against each defendant was similar, it was the normative decision of the jury that determined the death penalty was warranted against Sanders. (*Id.* at p. 529, 273 Cal.Rptr. 537, 797 P.2d 561.) That decision was not constitutionally suspect under the usual rules of proportionality review. (See *People v. Dillon* (1983) 34 Cal.3d 441, 448, 194 Cal.Rptr. 390, 668 P.2d 697 [applying Cal.Const.].) The same is true here. (Compare *People v. Morris, supra,* 53 Cal.3d at pp. 234-235, 279 Cal.Rptr. 720, 807 P.2d 949.)

7. Motion for Modification

Defendant claims the trial court's statement of reasons for denying the automatic motion for modification of the verdict shows that the court misunderstood the scope of relevant aggravating and mitigating evidence. Although the court did state that there was no evidence that would extenuate the gravity of the crime, there is no indication that the court considered that only such evidence was relevant in mitigation. (See *People v. Edwards, supra,* 54 Cal.3d at p. 847, 1 Cal.Rptr.2d 696, 819 P.2d 436; *People v. Siripongs* (1988) 45 Cal.3d 548, 585, 247 Cal.Rptr. 729, 754 P.2d 1306.) The court did not reject defendant's evidence in mitigation as irrelevant, but as unpersuasive. It is in this context that we read the court's statement that it found no circumstances in mitigation. The court also instructed the jury that evidence of any aspect of the defendant's character or record that defendant proffered in support of a sentence less than death

could be considered. (See *People v. Easley* (1983) 34 Cal.3d 858, 878, fn. 10,196 Cal.Rptr. 309, 671 P.2d 813.) As in *People v. Edwards, supra,* 54 Cal.3d at page 847, 1 Cal.Rptr.2d 696, 819 P.2d 436: "The court's discussion as a whole showed an awareness it had to independently reweigh *all* the evidence, including the mitigating evidence."

Defendant also claims the trial court erred in relying on the same erroneously admitted aggravating evidence upon which the jury relied in reaching the penalty verdict. He adds that the trial court refused his proposed instruction that would have confined the jury's consideration of aggravating evidence to factors listed in section 190.3. He infers from this refusal that the court must have considered nonstatutory aggravating evidence.

The trial court's statement of reasons for denying the motion for modification shows that the court restricted itself to statutory factors in aggravation. We have rejected the claim that evidence erroneously admitted under *People v. Boyd, supra,* 38 Cal.3d 762, 215 Cal.Rptr. 1, 700 P.2d 782, requires reversal of the penalty verdict; there was no objection and in light of the circumstances of the charged crimes and the volume of evidence of prior criminal activity, any error was harmless. We reject the claim with respect to the trial court's ruling on the same basis.

8. *Miscellaneous Contentions*

a. Defendant contends the jury was not given the expanded instruction on factor (k) of section 190.3 recommended in *People v. Easley, supra,* 34 Cal.3d at

page 878, footnote 10, 196 Cal.Rptr. 309, 671 P.2d 813. He is mistaken; the instruction was given. The instruction is "sufficient to advise the jury of the full range of mitigating evidence, and nothing more is required." (*People v. Edwards, supra,* 54 Cal.3d at pp. 841-842, 1 Cal.Rptr.2d 696, 819 P.2d 436; *People v. Sully, supra,* 53 Cal.3d at pp. 1244-1245, 283 Cal.Rptr. 144, 812 P.2d 163.)

b. Defendant claims the prosecutor improperly argued evidence proffered in mitigation, such as his epilepsy and good upbringing, were actually to be considered in aggravation. (See *People v. Davenport* (1985) 41 Cal.3d 247, 289-290, 221 Cal.Rptr. 794, 710 P.2d 861.) The argument is barred because defendant failed to object. (*People v. Edwards, supra,* 54 Cal.3d at pp. 833-840, 1 Cal.Rptr.2d 696, 819 P.2d 436.) In any event, the prosecutor simply discounted defendant's evidence as unpersuasive, and argued the epilepsy was feigned. This was permissible comment on the evidence. (See *People v. Caro* (1988) 46 Cal.3d 1035, 1062-1063, 251 Cal.Rptr. 757, 761 P.2d 680; see also *People v. Sully, supra,* 53 Cal.3d at pp. 1249-1250, 283 Cal.Rptr. 144, 812 P.2d 163.)

c. The court's failure to delete "inapplicable" aggravating circumstances from its instruction was not error. (*People v. Jones, supra,* 53 Cal.3d at p. 1147, 282 Cal.Rptr. 465, 811 P.2d 757; *People v. Beardslee, supra,* 53 Cal.3d at pp. 112-113, 279 Cal.Rptr. 276, 806 P.2d 1311.)

d. Neither the failure of section 190.3 to designate nor the court's failure to instruct the jury which factors are mitigating and which are aggravating was error. (*People v. Andrews, supra,* 49

Cal.3d 200, 233, 260 Cal.Rptr. 583, 776 P.2d 285; *People v. Allison* (1989) 48 Cal.3d 879, 898, 258 Cal.Rptr. 208, 771 P.2d 1294; *People v. McLain* (1988) 46 Cal.3d 97, 118, 249 Cal.Rptr. 630, 757 P.2d 569.)

e. The court's admission of evidence of unadjudicated crimes at the penalty phase did not violate defendant's due process, Sixth Amendment or Eighth Amendment rights. (*People v. Jennings, supra,* 46 Cal.3d at pp. 980-981, 251 Cal.Rptr. 278, 760 P.2d 475; *People v. McDowell, supra,* 46 Cal.3d at pp. 568-569, 250 Cal.Rptr. 530, 763 P.2d 1269.)

f. Defendant contends the statute of limitations had run on the criminal activity proffered in evidence in aggravation at the penalty trial, so that admission of the evidence was a violation of his "statutory, due process and Eighth Amendment rights." He failed to object to the evidence on this basis and, in any event, we have rejected the argument on the merits. (*People v. Sully, supra,* 53 Cal.3d at pp. 1245-1246, 283 Cal.Rptr. 144, 812 P.2d 163; *People v. Jennings, supra,* 46 Cal.3d at pp. 981-982, 251 Cal.Rptr. 278, 760 P.2d 475.)

g. Defendant contends the court erred in failing to instruct sua sponte that the corpus delicti of other crimes had to be proved independently of his admissions and that his admissions had to be viewed with caution. The court gave the instructions at the guilt trial. There was no sua sponte duty to deliver them at the penalty trial. (*People v. Thompson* (1988) 45 Cal.3d 86, 128, 246 Cal.Rptr. 245, 753 P.2d 37.)

h. Defendant claims the court should have

instructed that defendant's prior kidnapping conviction could only be considered under factor (b) *or* factor (c) of section 190.3, not both. He is wrong. (*People v. Melton, supra,* 44 Cal.3d at pp. 764-765, 244 Cal.Rptr. 867, 750 P.2d 741.) He also claims the court should have instructed the jury not to consider the charged offenses under factors (b) and (c). But on this record there is no possibility the jury would have done so. The prosecutor made it clear that the charged offenses were relevant under factor (a), that the prior kidnapping conviction was relevant under factor (c), and that the penalty phase evidence of defendant's prior criminal activity other than the charged offenses was relevant under factor (b). Nothing in the instructions or the arguments of counsel would have misled the jury into the error defendant complains of. (See *People v. Adcox, supra,* 47 Cal.3d 207, 272, 253 Cal.Rptr. 55, 763 P.2d 906; *People v. Miranda, supra,* 44 Cal.3d at p. 106, 241 Cal.Rptr. 594, 744 P.2d 1127.)

I Despite defendant's contention to the contrary, "[t]he 1978 death penalty statute is not unconstitutional even though it does not require findings that (i) death is the appropriate penalty beyond a reasonable doubt, (ii) aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt, (iii) aggravating circumstances were true beyond a reasonable doubt...." (*People v. Duncan* (1991) 53 Cal.3d 955, 979, 281 Cal.Rptr. 273, 810 P.2d 131.) Further, the statute is not unconstitutional for failing to provide a " 'procedure to enable the reviewing court to evaluate meaningfully the sentencer's decision.' " (*People v. Sully, supra,* 53 Cal.3d at p. 1251, 283 Cal.Rptr. 144, 812 P.2d 163, and cases cited.)

j. We have consistently rejected defendant's argument that the court must instruct that the jury may not consider prior criminal activity under factor (b) of section 190.3 unless it unanimously finds the activity has been proven. (*People v. Cox, supra,* 53 Cal.3d at p. 692, 280 Cal.Rptr. 692, 809 P.2d 351; *People v. Malone, supra,* 47 Cal.3d at p. 48, 252 Cal.Rptr. 525, 762 P.2d 1249; *People v. Ghent, supra,* 43 Cal.3d at pp. 773-774, 239 Cal.Rptr. 82, 739 P.2d 1250.) We have also consistently rejected the claim that the court must instruct on the elements of the other crimes shown by the evidence. (*People v. Carrera, supra,* 49 Cal.3d at p. 342, 261 Cal.Rptr. 348, 777 P.2d 121 and cases cited.)

k. Contrary to defendant's claim, the court was under no duty to instruct sua sponte that life imprisonment without parole means that defendant would never be considered for parole. (*People v. Duncan, supra,* 53 Cal.3d at p. 979, 281 Cal.Rptr. 273, 810 P.2d 131 and cases cited.)

l. The court was under no obligation to instruct the jury, in addition to all the instructions given, that the jury "should consider affirmatively all sympathetic mitigating factors, including nonstatutory mitigation." The instructions given adequately informed the jury of the factors to be considered in mitigation. (See *People v. Edwards, supra,* 54 Cal.3d at pp. 841-842, 1 Cal.Rptr.2d 696, 819 P.2d 436; *People v. Sully, supra,* 53 Cal.3d at pp. 1244-1245, 283 Cal.Rptr. 144, 812 P.2d 163.)

9. Cumulative Error

Defendant contends that cumulative error infected the penalty phase, so that there could have been no reliable determination of penalty. We disagree. We have determined the errors that did occur were "few in number and minimal in significance." (*People v. Ashmus* (1991) 54 Cal.3d 932, 1006, 2 Cal.Rptr.2d 112, 820 P.2d 214.)

Defendant asks us to take judicial notice of items in the prosecutor's file indicating that there was some dispute in the district attorney's office as to whether the office should seek the death penalty against defendant. Defendant argues that the memoranda of the deputy who opposed seeking the death penalty establish that the case against defendant was not overwhelming. He argues that it follows that any errors that occurred in the course of the trial must have been prejudicial in the penalty determination.

We doubt that it would be appropriate to take judicial notice of internal memoranda of the district attorney's office in this proceeding because we question whether the documents represent "official acts" of an executive agency. (Evid.Code, §§ 452, 459.) In any event, we fail to understand how the evaluation of a case by a single supervising deputy district attorney before trial can have any impact on our evaluation whether errors were harmless in the context of the trial. Nor was the dissenting deputy's evaluation of the facts particularly accurate; he apparently thought defendant did not plan a robbery and resorted to personal violence only when his escape from the scene of a burglary was blocked. The

evidence developed at trial convincingly showed that defendant did plan to rob the owner of the home where the murders took place. Thus we reject defendant's claim.

III. CONCLUSION

We set aside one of the multiple-murder special-circumstance findings, and the judgment otherwise is affirmed in its entirety.

OPPOSITION BRIEF

No. 09-1088

IN THE SUPREME COURT OF THE UNITED STATES

VINCENT CULLEN, JR., Acting Warden,
California State Prison at San Quentin, Petitioner,

v.

SCOTT LYNN PINHOLSTER, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI; RESPONDENT'S APPENDIX

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a federal court may grant relief under 28 U.S.C. § 2254(d) based, in part, on evidence developed during an evidentiary hearing permitted by *Michael Williams v. Taylor* and § 2254(e)(2)?

2. Did trial counsel who announced at the guilt verdicts that they had "done nothing to prepare mitigation," declined an offered continuance and then worked only 6.5 hours to prepare and present one witness, whose testimony was harmful, render ineffective assistance at penalty?

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Scott Lynn Pinholster respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 590 F.3d 651 (9th Cir. 2009).

INTRODUCTION

The State fabricates "cert. worthiness" with two Questions Presented that have nothing to do with the Ninth Circuit's fact-bound and unremarkable decision.

First, the Attorney General asks if a federal court can decide AEDPA unreasonableness based upon facts "the petitioner could have presented to the state court but did not." This loaded question completely misrepresents what actually happened in the case. The State denied Pinholster any opportunity to develop the factual predicate for his claim in state court. The Ninth Circuit held that Pinholster sought an evidentiary hearing in state court but was denied all opportunity to develop the facts. The lack of fact finding in state court is attributable only to the State, not to Pinholster.

Thus, the first Question Presented is built on a false premise. What the Ninth Circuit actually said is that "if the evidence is admissible under *Michael Williams* [*v. Taylor*, 529 U.S. 420 (2000)] or § 2254(e)(2), and if it does not render petitioner's claim unexhausted under *Vasquez* [*v. Hillery*, 474 U.S. 254 (1986)],

then it is properly considered in evaluating whether a legal conclusion reached by the state habeas court was reasonable application of Supreme Court law." (App. at 32.) This is a correct statement of the law in every circuit.

The State's second Question Presented is equally misleading. The Attorney General asks if trial counsel were ineffective "because" they "did not seek out a different psychiatrist and different family members" to obtain a different mitigation case from the one they presented through the petitioner's mother alone.

But this is not why the Ninth Circuit concluded that trial counsel's representation in this case was ineffective. The actual basis was that trial counsel were caught unaware and were completely unprepared for the penalty phase:

> Trial counsel completely failed to discharge their responsibility to conduct the investigation required under *Strickland*. One week before the penalty hearing, counsel told the judge that they "did not prepare a case in mitigation because they felt there would be no penalty phase hearing." Notwithstanding counsel's admission, they inexplicably declined to request a continuance--even though the judge indicated he would readily grant one--because they did not believe the extra time "would make a great deal of difference.

(App. at 39.)

Trial counsel's entire preparation for the penalty hearing "lasted less than an average workday [6.5 hours]" and "counsel interviewed and presented just one witness, whose testimony was not only misleading, but also self-serving and harmful to Pinholster's defense." (App. at 42.)

Counsel's actions were not the result of a reasonable strategic decision but instead were based upon their mistaken belief "that there would be no penalty phase at all." (App. at 42.) Counsel had "conducted no investigation into Pinholster's background at all, aside from interviewing his mother." (App. at 45.) After the guilt phase and as soon as trial counsel's erroneous interpretation of procedural law came to light, the trial judge informed counsel that there would be a penalty phase and offered them a continuance to remedy their mistake. (App. at 42.)

Abundant records documented the prepubescent onset of epileptic seizures and damage resulting from Pinholster's early childhood car accidents, head trauma, and physical abuse. These records would have been readily available to trial counsel given any amount of investigation. But shocked by their sudden realization of an inevitable penalty phase, trial counsel resigned to a loss by unreasonably refusing the trial judge's offer to continue the penalty phase for further investigation. Findings of ineffective assistance based on errors of this

magnitude are not limited to the Ninth Circuit but rather are consistent with this Court's case law and the law in other circuits.

The Attorney General's disparagement of the Ninth Circuit's en banc decision is baseless. For example, the assertion in the State's introduction that the Ninth Circuit did not explain key aspects of its holding is erroneous and patently misleading. The Attorney General claims that the court "never explained why the state court ruling was 'unreasonable' in light of the acknowledged fact that counsel had relied on the opinion of the defense psychiatrist that respondent was simply a psychopath." (Cert. Pet. at 3.) Yet the Ninth Circuit in fact gave a detailed explanation of counsel's failure to give their expert the very same educational, medical and psychiatric records that the expert later reviewed and categorized as extensive mitigation.

The State also claims that the Ninth Circuit did not explain "why it was unreasonable for trial counsel to interview respondent and his mother and then present the mother's testimony regarding the circumstances of respondent's upbringing." (Cert. Pet. at 4.) But the Ninth Circuit certainly did explain why it is deficient to put on one witness whose testimony is "self-serving and misleading" because counsel did not interview any other witnesses and did not conduct an investigation of Pinholster's background that would have revealed that his mother

was not accurately portraying his troubled childhood nor her own contribution to his setbacks. (App. at 40, 42, 45, 49.)

The last and most misleading of the Attorney General's claims is that "the Ninth Circuit did not explain why the state court erred or acted unreasonably in rejecting [the] ineffective-assistance claim, given the strong aggravating evidence that respondent had committed two murders and had gloated about his life of violent crime while testifying at the guilt phase." On the contrary, the federal courts at every level, including the en banc panel, acknowledged the aggravated nature of the murders and conducted a re-weighing of the totality of mitigation versus aggravation, as required by *Terry Williams v. Taylor*, 529 U.S. 362 (2000). The court repeatedly acknowledged Pinholster's boastful testimony and demeanor at trial, and noted that a thorough investigation of his mental health would have helped counsel explain his inappropriate conduct at trial.

A more candid review of the Ninth Circuit's opinion reveals no new blazed trail of unsettled law. This was a bread-and-butter application of *Strickland v. Washington*, 466 U.S. 668 (1984) to a penalty phase in which counsel, by their own admission, did nothing to prepare due to their basic misunderstanding of the penalty phase. Past erroneous applications of *Strickland* that the Attorney General wants to impute to the Ninth Circuit have no application in this clear-cut

case of ineffective assistance at the penalty phase that does not warrant this Court's review.

STATEMENT OF THE CASE

Pinholster hosted a party to memorialize the death of a friend. He and many others at the party drank alcohol excessively and smoked marijuana. Pinholster asked guests David Brown and Art Corona if they wanted to help him burglarize the house of Steve Kumar, a local drug dealer. They agreed to participate and divide the loot evenly. Corona drove.

They first stopped at the home of Pinholster's friend Lisa Tapar to ask directions to Kumar's house. Pinholster pounded on the door. When Tapar answered, Pinholster told her he "had a message from God." Alarmed by Pinholster's appearance and behavior, Tapar and her friend slammed the door on him twice and refused to speak with him further. In response, Pinholster repeatedly stabbed a knife into their door and vandalized Tapar's car.

After this bizarre incident, Pinholster, Brown, and Corona went to Kumar's house, which was empty with the back door left unlocked. While Pinholster and his cohorts were ransacking Kumar's home, the two victims (one of whom worked for Kumar dealing drugs) unexpectedly entered the home through the front door and discovered the burglary. As Pinholster, Brown, and Corona attempted to exit

through the back door, the victims swiftly proceeded to the back yard to trap them. According to Corona, Pinholster went "totally crazy" and began stabbing one of the men as they approached him. Brown did the same to the second man. Pinholster stole the victims' wallets and eventually the three men divided the small amount of money and marijuana that was recovered from the robbery.

Wilbur Dettmar and Harry Brainard were appointed as Pinholster's counsel. They incorrectly believed that notice from the prosecution of intended evidence in aggravation necessarily predicated any investigative effort by the defense to uncover mitigating evidence. They did not conduct any investigation of mitigation evidence. Because they never personally received written notice, they concluded incorrectly that the case could not proceed to the penalty phase.[1]

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[1] The relevant statute states, "no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant, within a reasonable period of time as determined by the court, prior to trial." Cal. Pen. Code § 190.3 (West 1978). No court has ever precluded the prosecution from proceeding to penalty phase based on a lack of notice or late notice. See *People v. Howard*, 749 P.2d 279 (Cal. 1988) (holding that court's grant of continuance was sufficient to remedy lack of specific § 190.3 notice about aggravating evidence); *People v. Daniels*, 52 Cal. 3d 815, 879 (Cal. 1991)(no prejudice arises where the prosecutor gives § 190.3 notice even after trial has begun so long as notice is given as soon as the prosecutor becomes aware it is required); *People v. Cummings*, 850 P.2d 1 (Cal. 1993) (late § 190.3 note will not preclude admission of aggravating evidence in the absence of bad faith).

Nine weeks into trial, counsel retained forensic psychiatrist John Stalberg to interview Pinholster to ascertain his state of mind at the time of the homicides. Counsel provided Dr. Stalberg with a police report and a 1978 probation report. Although the State argues that counsel hired Dr. Stalberg to prepare for penalty, his appointment and examination occurred during the time-frame when counsel still believed that there would be no penalty phase for lack of statutory notice. Their lack of interaction with Dr. Stalberg and their failure to provide him with any educational, medical or psychiatric treatment records that he believes he requested further shows they were not focused on penalty at the time he conducted his evaluation. Based on his single, brief interview, Dr. Stalberg concluded that Pinholster was not mentally ill and sent counsel a report of his conclusions. Dr. Stalberg never heard back from trial counsel again.

Pinholster proceeded to trial. The prosecution relied heavily on Art Corona, who testified in exchange for having murder charges against him dropped. Corona testified that he watched in horror as Pinholster and Brown stabbed the victims and stole their wallets. The prosecution also elicited expert testimony that Pinholster's fingerprints were found inside the house and that a bloody boot print found outside the house matched the tread of Pinholster's boots.

With the approval of trial counsel, Pinholster testified in his own defense that he burglarized the house alone that evening and that afterward Corona requested the address so that Corona could burglarize the drug dealer's house later. The implication of Pinholster's testimony was that Corona had murdered the victims when he went to the house alone after Pinholster. Pinholster also testified that he could not have committed the robbery-murders, in which the victims had been stabbed to death, because he only used a gun during the "hundreds" of robberies of drug dealers he had committed over the years. The jury convicted Pinholster of two counts of capital murder.

After the verdicts were returned, trial counsel admitted in open court that they had not done anything to prepare for penalty because, as previously stated, they believed statutory notice had not been given. After a hearing, the judge held that Pinholster had received proper, timely § 190.3 notice of aggravating evidence before counsel were appointed, so he overruled the objection. The judge offered to continue the penalty phase for one week to give counsel time to prepare. Counsel inexplicably declined the offered continuance, noting that extra time "wouldn't make any difference." Counsel then spent 6.5 hours preparing for the penalty phase.

The prosecution called eight penalty witnesses, six of whom were law enforcement officers. A probation officer and several sheriffs recounted how Pinholster had on various occasions resisted arrest, fought with them or, in their opinion, faked epileptic seizures in order to avoid being arrested. A seventh witness testified that Pinholster attacked him with a razor. The prosecution called Pinholster's estranged wife to testify that Pinholster had broken her jaw, but she admitted that she thought he was having an epileptic seizure at the time.

Defense counsel's limited preparation resulted in an equally limited mitigation presentation. They waived opening statement. They called only one witness, Pinholster's mother Burnice Brashear. Brashear gave her opinion that she had always provided a good home and taken care of all of her children. She described Pinholster as very difficult and inaccurately portrayed his siblings as "basically good children."[2] She conceded that her husband, Bud Brashear, had been "abusive or near abusive" to Pinholster but characterized the physical abuse as "discipline" brought on by Pinholster. Then, she discounted the abuse entirely by stressing that Pinholster was presently on friendly terms with his stepfather.

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[2] In reality, Pinholster's older brother, Alvin, was a schizophrenic who at the time of his suicide was facing pending charges for armed residential burglary, forcible rape and forcible oral copulation. Pinholster's sister, Tammy, had clinical depression and had prior convictions for prostitution and forced oral copulation on a minor.

Brashear briefly mentioned two car accidents in which as a young child Pinholster was injured, but trial counsel made no attempt to explain the permanent impact of either accident on Pinholster. Brashear testified that elementary school officials had diagnosed her son with "perceptive vision," but claimed he "did much better" after being placed in a different classroom. Trial counsel made no effort to accurately present Pinholster's educational disabilities, explain his poor performance in school, nor to put into context his mother's obliviousness, indifference and complete inability to cope with Pinholster's educational disabilities. Brashear also testified that Pinholster suffered from epilepsy, but once again counsel failed to explain the impact of epilepsy on Pinholster.

During penalty arguments, the prosecutor emphasized the lack of mitigation. She argued Pinholster was "conwise" and had learned to fake seizures to minimize his culpability. She scoffed at defense counsel's fleeting evidence of epilepsy and head injuries, stressing, "There is no evidence . . . A doctor should have been brought in. Medical records or something." She also questioned the relevance of "discipline" imposed by Pinholster's stepfather, noting that Brashear's own testimony revealed that Pinholster "came from a good home," was "upper-middle class" and "had many things going for him." Finally, she asked, "[w]hat

mitigating circumstances were presented? Nothing except a mother who loves her son."

After two and one-half days of deliberations, the jury returned a death verdict.

STATE HABEAS

After his direct appeal was affirmed, Pinholster filed a state habeas petition alleging ineffective assistance at penalty. He alleged that trial counsel were ineffective for failing to investigate his mental health and his troubled childhood. (Res. App. 148-71.) He tendered the declaration of forensic psychiatrist George Woods. Dr. Woods diagnosed Pinholster with a mood disorder and "severe and longstanding seizure disorders." He found that Pinholster's mixed seizure history includes grand mal, complex partial and absence seizures. The complex partial seizures are significant because they include "repetitive and purposeless movements (automatisms), anger, rage outbursts, disturbances of intellect, hallucinations, involuntary movements, and other bizarre phenomena."

Dr. Woods traced the potential cause of Pinholster's epilepsy to "two known major head injuries" from two car accidents. Dr. Woods declared that "[t]hese two serious head injuries in early childhood imply a post-traumatic diagnosis [as the determinant cause of epilepsy], but a neurological assessment conducted in 1968

may provide grounds for a different etiology." Dr. Woods also declared, "[s]erious head trauma in early childhood may have been the precipitating factors for Scott's seizure disorder, but other causes cannot be ruled out." Dr. Woods buttressed his diagnosis of epilepsy by recounting numerous prior similar diagnoses and prescriptions for anti-seizure medications given by doctors who had examined Pinholster throughout his entire life.

Dr. Woods opined that during the homicides Pinholster's actions were the result of a mood disorder that caused him to engage in "psychotic and grandiose thinking" that interfered with his ability to premeditate and deliberate and prohibited him from forming intent to kill. Dr. Woods also opined that at the time of the stabbings Pinholster was suffering a "complex partial seizure" that caused "impaired consciousness and therefore the inability to form intent." Dr. Woods also noted that contrary to Burnice Brashear's trial testimony, Pinholster's siblings suffered from mental illness and had significant criminal histories.

The State in its reply did not provide any declarations from mental health experts rebutting Dr. Woods' opinions.

The state supreme court originally issued an order to show cause (OSC), but later withdrew it and summarily denied the petition without an evidentiary hearing. Although the Attorney General refers to "state procedures" in which the

court "provisionally assume[s] the truth of the factual allegations in the petition," the so-called "post-card" denial does not explain whether or which state procedures were followed, what facts the court considered, what law the state applied, what facts the state disregarded, why the OSC order was granted then withdrawn, nor why the petition was denied. (App. 13, 302.)

FEDERAL HABEAS

Pinholster raised the same ineffective assistance claim in a federal habeas petition, once again emphasizing trial counsel's failure to investigate his mental health problems and troubled childhood. He again tendered the declaration of Dr. Woods and added the declaration of trial counsel's guilt-phase mental health expert, Dr. Stalberg. (Res. App. 1-64.) Stalberg declared that trial counsel only gave him certain police reports and an old probation report. (Res. App. 218-20.)

In preparation for the federal habeas petition Dr. Stalberg was provided and reviewed for the first time all of Pinholster's educational, medical and psychiatric records. He concluded that there was "voluminous mitigating evidence," including "repeated head trauma, evidence of brain damage," "a childhood of physical abuse, emotional neglect, and a family history of mental illness and criminal behavior." Dr. Stalberg also believed that Pinholster's epilepsy was potentially mitigating because "epileptics are more sensitive to drugs," and "have

difficulty controlling their behavior, and are prone to abnormal behavior between seizures." (Res. App. 218-20.) The petition alleged that if counsel had provided Dr. Stalberg with full information about Pinholster's history and his conduct during and just prior to the offenses, Dr. Stalberg would have concluded that Pinholster's conduct was influenced by "severe genetic and organic mental disorders," "repeated head trauma," and "evidence of brain damage."[3]

With the district court's permission, Pinholster later augmented his ineffective-assistance claim with the declarations of forensic psychiatrist Sophia Vinogradov and pediatric neurologist Donald Olson. Although the State in its cert. petition refers to the additional declarations as interjecting "facts radically different than those [Pinholster] presented to the state court," the doctors' declarations contained no new facts and no new bases for their diagnoses. (Cert. Pet. at 11.)

Dr. Vinogradov relied on all of the same facts as Dr. Woods, ultimately concluding that Pinholster suffered from "personality change -- aggressive type,

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[3] In an abundance of caution, Pinholster filed a second state habeas petition to obviate any argument that he failed to exhaust the failure-to-prepare-the-mental-health-expert aspect of his IAC penalty claim. Thus, the Stalberg declaration and the related allegations about trial counsel's failure to properly prepare him for the forensic psychiatric examination were presented to the state court. As with the first state petition, the California Supreme Court summarily dismissed the claim on the merits in a post-card denial. (App. 300-301.)

due to serious childhood head trauma." (Res. App. 176-217, 221-50.) Consistent with Dr. Woods and Dr. Stalberg's declarations, Dr. Vinogradov noted that as a young child Pinholster had suffered trauma to his head during two car accidents that resulted in brain damage, the probable cause of his epilepsy. Dr. Vinogradov like Woods and Stalberg corroborated her diagnosis with 1968 medical tests performed on Pinholster, at age nine, that revealed an "abnormal EEG with changes consistent with underlying seizure activity." Dr. Vinogradov noted as well that in 1968 doctors had prescribed Dilantin, an anti-seizure medication, three times per day. She like Dr. Woods also noted that Pinholster's siblings had a history of mental illness and significant criminal histories.

Dr. Vinogradov concluded that brain damage affected Pinholster's "precortical functioning" resulting in "further deterioration in functioning during times of increased demand or psychosocial stress" and severely limiting his "attentional capacities, impulse control, learning abilities, social-emotional processing, and ability to handle anger and aggression." Dr. Vinogradov opined that Pinholster's organic personality syndrome affected his behavior during the homicides:

> On the night of the crimes, while intoxicated on multiple substances, Mr. Pinholster experienced perceptual aberrations and possible psychotic symptoms. This

> disinhibited, perceptually altered, and severely compromised mental state was superimposed on a man who already had extremely poor impulse control and a tendency to aggressive outbursts due to the long-term effects of childhood head trauma. This was added to a genetic predisposition for affective instability and a lifetime of socialization into violent and chaotic behavior. During his confrontation of the victims, this confluence of factors resulted in Mr. Pinholster's absolute loss of behavioral control and resulted in the crimes of which he was convicted.

Dr. Olson opined that Pinholster's brain damage and resulting seizure disorder were most likely caused by the severe head trauma he had experienced during one of the car accidents. (Res. App. 172-75.)

Pinholster also submitted declarations from family members and a teacher who contradicted his mother's testimony with information about his deprived and neglectful childhood. Several family members testified that Pinholster's maternal grandmother and his stepfather physically abused him as a young child. The stepfather's beatings were particularly severe, including beating Pinholster with a paddle about the head and hitting him with a with a two-by-four board. They also declared that he and his siblings went hungry and lacked sufficient clothing while his mother bought expensive clothes and went out on dates. His teacher declared that he did poorly in school, talked to himself and had no friends at school. Pinholster's mother took no steps to help him after the teacher advised her

that she thought he had mental problems. At age 11, he was confined to a mental institution for 4 months.

Confronted with the state court's unexplained refusal to hold a hearing despite a clear prima facie showing of ineffective assistance at penalty, the district judge, Hon. Gary Taylor, granted an evidentiary hearing on this issue. The State claims that the district court did not apply AEDPA. (Cert. Pet. at 8.) After *Woodford v. Garceau*, 538 U.S. 202 (2003) changed the law of the Ninth Circuit, Judge Taylor revisited his original order and issued a second order explicitly stating that he had granted a hearing and analyzed the claims under AEDPA standards. At the hearing, Pinholster called Drs. Vinogradov and Olson, who testified consistently with their declarations. The Attorney General called Drs. Stalberg and Rudnick. Dr. Stalberg persisted in his original determination that Pinholster was antisocial, but he conceded that at the time of his interview with Pinholster he was not provided the necessary records to determine the nature and extent of Pinholster's mental health history which he now categorizes as "voluminous mitigation." The Attorney General introduced Dr. Rudnick, who was also a new expert at the federal hearing testified that Pinholster was not brain damaged. (App. 129.)

After the hearing, the district court found that Pinholster's head trauma caused him to develop epilepsy and related mental deficits. The district court also determined that Burnice Brashear had significantly misrepresented the abuse and neglect that Pinholster had suffered as a child. Weighing the new mitigation against the totality of the aggravation, Judge Taylor held that the California Supreme Court's application of *Strickland* was objectively unreasonable and granted relief.

In an 8-3 en banc opinion, authored by Judge Milan Smith, the Ninth Circuit affirmed. While the dissent found that the district court misapplied AEDPA and did not defer to the state court's summary denial of the claim, the majority found that the district judge properly granted a hearing, complied with AEDPA and correctly concluded that the state court was objectively unreasonable in denying Pinholster's ineffective-assistance claim at penalty.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE WARDEN EXAGGERATES THE DIFFERENCES BETWEEN PINHOLSTER'S ALLEGATIONS IN STATE COURT AND HIS ALLEGATIONS AND PROOF IN FEDERAL COURT

A. While Pinholster changed experts between state and federal courts, the core facts and legal theories remained the same.

There is no denying that Pinholster and the State added mental health

experts after the case transitioned from state court to the federal court and ultimately relied on those new experts at the evidentiary hearing. But under habeas law, the emphasis is on the operative facts and the legal theories, not which particular person is called to testify as an expert witness. A comparison of the substance of these experts' opinions and their similar bases for diagnoses shows that nuances in medical terminology have been greatly overstated by the Attorney General as differences of opinion.

1. In state court, Pinholster alleged that trial counsel were ineffective for failing to prepare and present mental health and social history as mitigation.

From the beginning of the post-conviction proceedings, Pinholster repeatedly and consistently alleged that trial counsel's failure to prepare and present evidence of his mental health problems and troubled childhood resulted in ineffective assistance at penalty phase. The first state petition (filed Aug. 15, 1993) alleged that Pinholster suffered from "profound mental disorders" and "serious mental impairments throughout his life." The petition specifically pleaded "head traumas during early childhood" as one of the causes for his mental disorders and impairments. Counsel tendered Dr. Woods' declaration more thoroughly discussing Pinholster's childhood head injuries and opining that he

suffered from both mood and seizure disorders that affected his ability to form specific intent and control his actions during the offenses. (Res. App. 221-50.)

The second state petition (filed August 29, 1997) alleged that Dr. Stalberg "failed to alert trial counsel that [Pinholster's] organic disorders provided a mental state defense" to the charged offenses and aggravators. The petition also alleged that Pinholster's "mental disorders" mitigated the crimes for a variety of reasons. (Res. App. 65-147.) In support, counsel tendered the declaration of Dr. Stalberg, who stated that he had made his initial diagnosis without having received any of the educational, medical and psychiatric treatment records that he had requested from counsel. (Res. App. 218-20.) Dr. Stalberg also declared that counsel did not inform him that shortly before the homicides, Pinholster had gone to a friend's house wielding a knife and claiming he had "a message from God." After reviewing all of the social history records and learning all the relevant facts on the night of the crimes, Dr. Stalberg opined that there was a wealth of mitigation to be offered at trial, including "epilepsy," "severe genetic and mental disorders," "repeated head trauma," and "evidence of brain damage." Thus, Pinholster did allege and support with declarations in state court the facts that his trial counsel failed to investigate and present evidence of his organic disorders and brain damage.

2. In federal court, Pinholster alleged that trial counsel were ineffective for failing to prepare and present mental health and social history as mitigation.

Although the Attorney General has built his certiorari strategy around the notion that Pinholster completely changed his ineffective-assistance strategy when he moved from state to federal court, the reality is that the state petitions contained all of the same operative facts and legal theories as presented in federal court. The only differences were minor and the natural result of taking live testimony subject to cross examination. Just as he had in the state proceeding, Pinholster emphasized in federal court that his trial counsel had unreasonably failed to thoroughly investigate his mental state at the time of the homicides in the face of several red flags of serious mental health problems. Just as in state court, the mental health experts identified two serious head injuries during early childhood as the probable cause of Pinholster's longstanding and severe epilepsy. And just as in state court, the experts opined that the cognitive deficits associated with epilepsy negatively affected Pinholster's state of mind and conduct at the time of the offenses. While Dr. Woods referred to the "synergistic" effect of substance abuse, mood disorder and seizures and Dr. Vinogradov referred to the "confluence" of substance abuse, brain damage-related impairments and seizures, both focused on how the combination of impairments robbed Pinholster of the

ability to control his behaviors and form specific intent at the time of the homicides. The fact that different experts used different but related nomenclature to talk about the same operative facts in support of the same legal theories does not fundamentally alter the claim or violate AEDPA in any way.

B. Once a federal hearing was granted, each side presented some new evidence that had not been presented in state court.

The Attorney General emphasizes every conceivable change in Pinholster's case by mechanically highlighting every nuance of psychiatric diagnoses. Yet, variants in the State's own case, new experts, strategy shifts, brand-new arguments in federal court, are far more conspicuous.

In state court, the Attorney General failed to tender any mental health expert declarations. Once the case proceeded to federal court, the State called Dr. Rudnick to opine about the cause of Pinholster's epilepsy. The State also called Dr. Stalberg as a witness at the federal hearing having never submitted his declaration in state court. Dr. Stalberg stood by his diagnosis but also testified to defense counsel's failure to discover "voluminous mitigation." Judge Taylor, who saw and heard the witnesses testify, ultimately found Pinholster's experts to be more persuasive. But the State's ultimate failure does not diminish the reality that

it tried to convince the court otherwise with two new experts it had not introduced in state court.

During the federal evidentiary hearing, the Attorney General also offered a completely new and different explanation for trial counsel's incompetence at penalty phase, that Pinholster had told counsel not to offer any mitigation at trial. (App. 117.) The district judge rejected this contention for lack of evidence. Yet it is another example of the Attorney General's changed strategy and variable evidence from state to federal court.

What is sauce for the goose is sauce for the gander. Pinholster's strategy and claim never wavered. The bases of his experts' opinions remained the same from state to federal court. But in any event it would be unfair to penalize Pinholster for conduct the State engaged in during the course of the litigation.

It is important to note that the Ninth Circuit held that even without the new experts' testimony it would have found an unreasonable application of *Strickland* based on trial counsel's failure to prepare and present evidence of Pinholster's troubled childhood. (App. at 69.) The State's only response is to argue that the majority must not be telling the truth, but, as set forth directly below, counsel's failure to investigate the defendant's troubled childhood is a classic basis for ineffective assistance at penalty.

II. THE CIRCUIT COURT CORRECTLY APPLIED THE *WILLIAMS-WIGGINS-ROMPILLA* LINE OF CASES TO THE SPECIFIC FACTS OF THIS CASE.

A. The Circuit did not plow any new ground.

There is nothing cert-worthy about the federal court's grant of penalty relief in this case. The federal court simply applied the definitive test for ineffective assistance set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The circuit court relied on the well-known trilogy of AEDPA cases applying *Strickland* to penalty claims, See *Terry Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Rompilla v. Beard*, 545 U.S. 374 (2005).

The State's cert petition relies heavily on 10 per curiam summary dispositions (not so identified in its table of authorities)[4] but virtually ignores the *Williams-Wiggins-Rompilla* line. The State cites *Terry Williams* once in support of a procedural argument, and completely ignores *Wiggins* and *Rompilla*. The omission is telling. If the important federal question raised by this case is how to apply *Strickland* in the AEDPA era to counsel's duty to prepare and present

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[4] Summary dispositions do not carry the same precedential effect as opinions decided after full briefing and argument. *Hohn v. United States*, 524 U.S. 236, 251 (1998) ("[W]e have felt less constrained to follow precedent where, as here, the opinion was rendered without full briefing and argument."); *Gray v. Mississippi*, 481 U.S. 648, 651, no.1 (1987) ("The Court, of course, at times has said that summary action here does not have the same precedential effect as does a case decided upon full briefing and argument.").

mitigation, it is inconceivable that one would omit this Court's most relevant and timely IAC penalty cases that were decided after full briefing and argument.

In *Terry Williams*, the defendant contacted the police, who incorrectly believed that the elderly victim had died of blood alcohol poisoning, and admitted hitting him with a mattock in the chest. Williams had prior convictions for armed robbery, burglary, grand larceny and unadjudicated criminal activities, including two auto thefts and two violent assaults on elderly victims. He lured the first victim out of his house by starting a fire and attacked and robbed him. He beat the second victim so badly that she was in a permanent vegetative state.

Trial counsel started investigating mitigation one week before trial. They called Williams' mother and two neighbors, all of whom testified that the defendant was non-violent and a "nice boy." Counsel also introduced evidence that during a prior robbery Williams removed the bullets from his gun so he would not injure the victims.

Williams alleged his counsel were ineffective for failing to prepare and present evidence that he is "borderline mentally retarded," suffered "repeated head injuries," and had "mental impairments organic in origin." He also alleged that he suffered substantial abuse and deprivation as a child. The state court held an evidentiary hearing and issued a written opinion finding no prejudice. This

Court found that the state court's denial of the ineffective-assistance claim was an objectively unreasonable application of *Strickland*.

In *Wiggins*, the defendant, who had no prior record, was convicted of murdering an elderly woman, whose body was found in the bathtub with her panties pulled down and insecticide sprayed all over her face. At penalty phase, trial counsel limited their penalty defense to a showing that Wiggins was not a principal in the offense. 539 U.S. at 553.

Wiggins alleged that trial counsel were ineffective for failing to prepare and present evidence that he had limited intellectual abilities, was raised by an alcoholic and abusive mother, and was sexually abused by his caretakers while in foster care. 539 U.S. at 516-17. The state court held an evidentiary hearing and issued a written opinion finding that counsel's performance was not deficient because they made a tactical decision to retry the facts in lieu of presenting mitigation. Once again, this Court found that the state court's denial of the ineffective assistance claim was objectively unreasonable.

In *Rompilla*, the defendant was convicted of the murder of a barkeeper, whose body was found in the bar with multiple stab wounds and burned. Rompilla had prior convictions for rape, burglary and theft, arising from a factually similar attack on a female barkeeper. At penalty phase, counsel called

five family members, who claimed residual doubt and begged for mercy. Counsel also called Rompilla's teenage son, who testified that he loved his father and would visit him in prison.

Rompilla alleged that trial counsel were ineffective for failing to prepare and present evidence that he had organic brain damage caused by fetal alcohol syndrome and was borderline mentally retarded. He also alleged that they failed to review a court file for a prior conviction that would have revealed that he was raised by two alcoholic parents who neglected and physically abused him during childhood and that he became an alcoholic as an adult. The state court held an evidentiary hearing and issued a written opinion finding that counsel's performance was not deficient. Yet again, this Court found that the state court's denial of his ineffective-assistance claim was an objectively unreasonable application of *Strickland*.

B. The Ninth Circuit correctly held that trial counsel's failure to prepare and present mitigation is ineffective assistance under the *Williams-Wiggins-Rompilla* line.

Comparing Pinholster's case to this trilogy demonstrates that the circuit court simply followed this Court's most recent and relevant case law on the duty to prepare and present mitigation evidence at the penalty phase. The murders in *Terry Williams*, *Wiggins* and *Rompilla* were every bit as aggravated, if not more,

than the murders in this case. Each victim was significantly more vulnerable than the two victims in this case. Although Wiggins was a first-offender, Williams and Rompilla had violent priors rivaling if not exceeding Pinholster's self-reported criminal history, even if his boastful testimony is taken at face value.

Each of the trial counsel in the trilogy of cases did far more to prepare for penalty phase than trial counsel in this case. By their own admission in open court, Dettmar and Brainard did nothing to prepare prior to the guilt verdicts. They then declined an offered continuance which could have helped them recover from their total lack of preparation. They called Pinholster's mother because she was the only witness they had talked to, not because of any strategy reasons, as the Attorney General suggests. The results were disastrous. She testified under the delusion that she had provided her son with discipline and a good home then added that her son was essentially incorrigible and justly deserved the harshest of punishments even as a small child. The prosecutor even used her testimony to argue that there was no mitigation.

The mitigation uncovered by habeas counsel in this case is qualitatively and quantitatively similar to the uncovered mitigation in *Terry Williams*, *Wiggins* and *Rompilla*. Pinholster presented a combination of mental impairments related to epilepsy and brain damage and a severely troubled childhood that closely tracks

Terry Williams. As the Court in *Terry Williams* noted, the mental impairments were especially important because "his violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation." *Id.* at 398.

Rather than honestly grappling with the disconnect between its argument and the *Williams-Wiggins-Rompilla* line, the State sets up a straw-man to knock down. It argues that the Ninth Circuit, based on the ABA guidelines, created a "rigid and hindsight ineffective assistance rule" that compels counsel in every case to present "bad childhood" evidence, and then correctly notes that such a Procrustean rule would conflict with *Strickland*, which eschews hard and fast rules for proper representation. See cert pet. at 25-26. This is an obvious attempt at capitalizing on *Bobby v. Van Hook*, 130 S.Ct. 13 (2009) (per curiam), where this Court summarily reversed the Sixth Circuit for holding that counsel must comply with the 2003 ABA Guideline for the Appointment and Performance of Defense Counsel in Death Penalty Cases. But the Ninth Circuit did not inflate the importance of the ABA guidelines and it certainly did not create a per se rule that evidence of a bad childhood must be presented. Rather it used the more general 1982 ABA Standards in effect at the time of trial and stressed, "we make clear, as the Supreme Court has, that such standards do not define reasonable

representation, but rather are 'guides to determining what is reasonable.'" App. at 38, quoting *Strickland*, 466 U.S. at 688.

Throughout the petition, there is an undercurrent of dissatisfaction with what the Attorney General views as the Ninth Circuit's refusal to defer to the state-court adjudication of the ineffective-assistance claim. The State argues that "this case is another in a long and growing line of cases in which the Ninth Circuit has failed to review state court determinations deferentially." (Cert. Pet. at 11.) There is no acknowledgment, however, that the "state procedures" for adjudicating a claim give the federal courts little, if any direction, about what to defer to.[5] The California Supreme Court held no hearing, originally issued an OSC and then withdrew it for unknown reasons, and finally issued a post-card denial of the petition with no discussion of any factual findings or legal

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[5] The State's invocation of an AO report on the cost of federal evidentiary hearings as a reason to defer to its "state procedures" is ironic. A recent National Center for State Courts publication observed, "California's system of post-conviction review seems designed to punt responsibility for constitutional review to the federal courts." J. Gould, *Justice Delayed or Justice Denied? A Contemporary Review of Capital Habeas Corpus*, 29 Justice System Journal 273, 282 (2008). The report explains that from 1978 to 2005, the California Supreme Court issued post-card denials in 92% of the habeas cases it reviewed, and noted, "[t]hese summary dispositions provide no explanation or details for the court's holding, thus giving the federal courts nothing to consider besides the decision itself in weighing the constitutional merit of the defendant's later federal petition." *Id.*

conclusions that precipitated that decision.

AEDPA deference does not require the federal courts to turn a blind eye to unreasonable decisions that result from such a flawed process. As this Court noted in *Miller-El v. Cockrell*, 537 U.S. 322 (2003): "Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Id.* at 340. The Attorney General's understanding of AEDPA deference as set forth in his petition cannot be correct. The state courts in *Terry Williams*, *Wiggins* and *Rompilla* each held extensive evidentiary hearings and issued written opinions explaining why penalty relief was denied. Yet, this Court found each state court's denial of the *Strickland* claim to be objectively unreasonable. The state decision here is similarly unreasonable.

III. THE WARDEN'S INTERPRETATION OF § 2254(d)(1) CONFLICTS WITH THIS COURT'S LEADING CASES AND WOULD RENDER ALL FEDERAL HEARINGS MEANINGLESS.

The State repeatedly argues that a habeas petitioner cannot present any new evidence in federal court because only evidence presented in state court is relevant to assessing the reasonableness of the state court's adjudication of his

claims. While exhaustion law has always limited a petitioner's federal claims, there has never been a wholesale prohibition on the presentation of any new evidence in federal court, as the State now urges.

Prior to AEDPA, this Court rejected a similar argument by the California Attorney General that a petitioner was barred from presenting any additional evidence in federal court in support of a claim that had been denied by the state court. *See Vasquez v. Hillery*, 474 U.S. 254, 260 (1986). The Court held that because he had not received a full and fair hearing in state court on his grand jury discrimination claim, Hillery was permitted to present a statistical expert and additional declarations on the same claim in federal court.

Seeking to avoid *Vasquez*, the State argues that AEDPA applies the comity rules of exhaustion law, which give a state the first chance to consider a constitutional claim, to prohibit the consideration of any new evidence in federal court under any section of AEDPA even when the state court does not hold a full and fair hearing.

Michael Williams v. Taylor, 529 U.S. 420 (2000) reveals that AEDPA authorizes a federal evidentiary hearing, particularly when the state court did not hold one. In *Michael Williams*, the petitioner did not know of or raise his claims of juror bias, prosecutorial misconduct and a *Brady* violation until he filed his

federal habeas petition. The district court ordered an evidentiary hearing on the claims. The state argued that § 2254(e)(2) prohibited holding a federal hearing on these claims because the petitioner had "failed to develop" them in state court. This Court found that the term "failed to develop" referred to a lack of diligence and remanded for an evidentiary hearing the claims for which the petitioner had tried diligently to develop in state court. The Court noted, "Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Id.* at 437.

Vasquez and *Michael Williams* show that the State's petition for certiorari employs an inaccurate reading of the law regarding federal evidentiary hearings in order to fabricate an important question. While a state court should be given the first opportunity to hold a hearing on habeas claims meriting a hearing, the federal court is not always barred from holding a hearing, particularly if the state court improperly limited the petitioner's right to prove a fact-bound claim such as ineffective assistance. This is exactly what happened in the instant case. Pinholster alleged ineffective assistance based on the failure to prepare and present mental health testimony and evidence of his deprived, neglectful upbringing. He requested an evidentiary hearing on his ineffective-assistance claim. The California Supreme Court summarily denied the claim in a post-

cardcard denial that contains no discussion of why the claim was denied. Just as in *Vasquez* and *Michael Williams*, the federal court granted a hearing in the wake of a wrongful denial of a hearing by the state court. Just as the petitioners in *Vasquez* and *Michael Williams*, Pinholster ultimately proved his claim once he was afforded an evidentiary hearing.

AEDPA should reward a state that makes reasonable efforts to clarify facts and provide a reasoned decision for its adjudication of habeas claims. But under the Attorney General's reading of AEDPA, a state is rewarded when it shifts all costs of fact-gathering to federal courts and then lays down the federalism, finality, and comity cards to keep the facts distorted.[6]

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[6] At least one senator has observed that the California Supreme Court's post-card denials require the federal courts to start each California capital habeas case "from scratch" and "seem determined to thwart the intentions of AEDPA and shift costs to the federal government by requiring the federal courts to do the work that the state system should complete." When questioned by Senator Diane Feinstein, California Supreme Court Chief Justice Ronald George admitted that the post-card-denial procedure is a deliberate effort to save the state court's time and resources. J. Gould, *Justice Delayed or Justice Denied? A Contemporary Review of Capital Habeas Corpus*, 29 Justice System Journal 273, 282 (2008); See also Senator Diane Feinstein's website, http://feinstein.senate.gov/05releases/r-habeas.htm; A. Alarcon, *Remedies for California's Death Row Deadlock* , 80 S. Cal. L. Rev. 697,742 (2007).

A. Section 2254(d)(1) does not limit the petitioner to the state-court record.

The habeas statute itself undermines the State's argument that the reasonableness of the state court's determination is limited to the state-court record

Under AEDPA, a petitioner who attacks a state court's legal holding must demonstrate that the court's decision is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). A petitioner who attacks factual findings must demonstrate that the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). The omission of the phrase "in light of the evidence presented in the State Court proceeding" in § 2254(d)(1), juxtaposed with its inclusion in § 2254(d)(2), suggests that Congress intended to treat post-conviction attacks on legal holdings differently than attacks on factual findings. See *Bates v. United States*, 522 U.S. 23, 39-30 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally in the disparate inclusion or exclusion."). The two § 2254(d) subsections, read as a whole, reveal

that a habeas petitioner attacking a state court legal holding under § 2254(d)(1)--which is exactly what Pinholster did when he attacked the state court's finding of no ineffective assistance--- is not limited to the state-court record.

The State tries to escape the plain language of the statute by selectively quoting from *Holland v. Jackson*, 542 U.S. 649 (2004) (per curiam). In *Holland*, the Court refused to consider the affidavit of Martha Gooch, who impeached the prosecution's star eyewitness, in analyzing an ineffective-assistance claim because the affidavit had never been presented to the state court. The Court wrote, "[i]in this and related contexts we have made clear that whether a state court's decision was unreasonable must be assessed in light of the record the court had before it." *Id* at 652. But a complete reading of *Holland* makes it clear that the Court refused to consider Gooch's affidavit because the defendant never explained why he had not presented her testimony at the two-day evidentiary hearing in state court, resulting in finding that the defendant was not diligent. Citing *Michael Williams*, the Court stressed, "[u]nder the habeas statute, Gooch's statement could have been the subject of an evidentiary hearing by the District Court, but only if [the defendant] was not at fault in failing to develop that evidence in state court." *Id* at 652-53. This shows that the Court was simply applying traditional AEDPA principles, not radically restricting the analysis of reasonableness in all §

2254(d)(1) claims to solely what was presented in state court.

The Court in *Michael Williams* had good reason to give federal courts flexibility to hold an evidentiary hearing, so long as the district judge stays properly focused on whether or not the petitioner acted diligently in presenting his claims in state court. Where, as in *Holland*, the state court gives the petitioner a full and fair hearing to prove his claim, it may well be difficult for him to establish the requisite diligence to justify a further hearing in federal court. But where, as here, the state court denies the petitioner's request for a hearing on a fact-bound claim such as ineffective assistance and summarily dismisses the petition, the petitioner may very well be able to establish the diligence necessary to obtain a federal hearing.

B. This Court had never held that a petitioner must first demonstrate an objectively unreasonable application of federal law under § 2254(d)(1) in order to receive a federal evidentiary hearing under § 2254(e)(2).

The State faults the district court for holding an evidentiary hearing without first concluding that the California Supreme Court acted unreasonably in summarily dismissing Pinholster's ineffective assistance claim. The State does not, and cannot, cite one case in which this Court held that a determination that a state court's adjudication of a claim was objectively unreasonable under §

2254(d)(1) is a prerequisite to receiving a federal evidentiary hearing. *Michael Williams* certainly does not say that. Nor would such a requirement make any sense.

Indeed, if a petitioner could demonstrate without any further fact development that the state court's denial of his claim was objectively unreasonable, what need would he have for a federal evidentiary hearing? The petitioner would be entitled to relief on the present record. This is the fundamental flaw of the State's unorthodox reading of AEDPA. The interpretation, if accepted, would require every habeas petitioner to actually win his case before being entitled to receive an evidentiary hearing on it. AEDPA does not compel such a nonsensical result.

C. The warden's novel reading of § 2254(d)(1) renders § 2254(e)(2) meaningless.

This Court in *Schriro v. Landrigan*, 550 U.S. 465, 468 (2007), stated that AEDPA does not alter a district court's discretion to hold an evidentiary hearing if a hearing is not barred by 28 U.S.C. § 2254(e)(2). The State's reading of § 2254(d)(1) would render § 2254(e)(2) superfluous. Under § 2254(e)(2), a petitioner who "failed to develop the factual basis of a claim in State court proceedings" cannot receive a federal hearing absent specific circumstances set

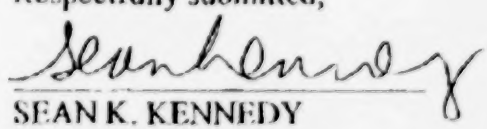
forth in subsections (A) and (B). But according to the State, § 2254(d)(1) already imposes a wholesale prohibition on federal evidentiary hearings because its analysis of unreasonableness is strictly limited to the existing state-court record. If this reading of § 2254(d)(1) were true, there simply would be no need for further explicit limitations on the right to an evidentiary hearing in federal court. Congress' inclusion of § 2254(e)(2) in AEDPA and this Court's case law interpreting the provision refutes the Attorney General's interpretation of § 2254(d)(1).

CONCLUSION

The Attorney General has pursued a certiorari strategy that misportrays this case as involving new and unorthodox interpretations of AEDPA with sweeping importance to federal habeas. In fact, the decision in this case turned on a rather ordinary application of the law on ineffective assistance at the penalty phase under the famous trilogy of Supreme Court cases. The petition for a writ of certiorari should be denied.

Respectfully submitted,

DATED: May 12, 2010



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REPLY BRIEF

No. 09-1088

SUPREME COURT, U.S.
FILED
2 2 2010
OFFICE OF THE CLERK

In the Supreme Court of the United States

VINCENT CULLEN, ACTING WARDEN OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN, *Petitioner*,

v.

SCOTT LYNN PINHOLSTER, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent's Brief in Opposition (Opp.) illustrates that there is substantial confusion about the two important issues that petitioner seeks to raise in this Court, and thus that there is a compelling need for clarification on these issues from this Court. The first issue involves the appropriate scope of review under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The second issue involves the standard of review applicable to claims of ineffective assistance of counsel. The confusion about these two issues is revealed by the flaws in the reasoning of the *en banc* majority and is highlighted by respondent's unwillingness to directly address those issues in his opposition.

I.

The first issue is whether it is appropriate under § 2254 for a federal court to conclude that a state court's rejection of a claim was unreasonable in light of facts that an applicant could have but never alleged in state court. Respondent says that this issue is somehow well settled in his favor. Opp. at 1-2. But the Chief Judge of Ninth Circuit Court of Appeals, in his lengthy dissent, demonstrated that respondent's assertion is wrong. As repeatedly emphasized in the dissent, there is need for this Court to review the *en banc* majority's fundamental misinterpretation of the limits § 2254 imposes on such reliance on newly-alleged facts in federal collateral review. See, e.g., App. 82, 83-84, 88, 163 (Kozinski, J., dissenting).

Indeed, in *Bell* v. *Kelly*, 07-1223, this Court granted certiorari on a question almost identical to the first question petitioner seeks to present in this case. The question in *Kelly* was: "Did the Fourth Circuit err when, in conflict with decisions of the Ninth and Tenth Circuits, it applied the deferential standard of 28 U.S.C. § 2254(d), which is reserved for

claims 'adjudicated on the merits' in state court, to evaluate a claim predicated on evidence of prejudice the state court refused to consider and that was properly received for the first time in a federal evidentiary hearing?" This Court in *Kelly* dismissed certiorari as improvidently granted after oral argument revealed that the facts and procedural posture of that case prevented the Court from reaching the question. But the question remains worthy of review.

Respondent's own arguments demonstrate that there is a need for this Court's guidance. Respondent asserts that there was nothing at all controversial about the *en banc* majority's holding that § 2254(d)(1) authorizes a federal court to rely on facts never presented to the state court as a basis for concluding that that the state court unreasonably rejected the claim for relief. Opp. at 1-2, 36-38. He asserts that "[t]his is a correct statement of law in every circuit." Opp. at 2. But he cites no case authority from *any* circuit, let alone *every* circuit.

Even if respondent's point were supported by some circuit authority, it unavoidably would conflict with this Court's holding, in *Holland* v. *Taylor*, 542 U.S. 649, 652 (2004) (per curiam), that the determinative § 2254(d)(1) question of "whether a state court's decision was unreasonable must be assessed *in light of the record the court had before it*." (Emphasis added.) In attempting to explain away *Holland's* unconditional statement of law, respondent in essence claims that, while this Court *said* that, it did not *mean* it. He goes on to characterize petitioner's reading of the plain language of § 2254(d)(1), as corroborated by this Court in *Holland*, as "radical[]." Opp. at 37. But, if respondent's position were as settled as he represents, and if petitioner's discussion of the converse rule were so "radical," then this Court would not have concluded, in *Williams (Michael)* v. *Taylor*, 529 U.S. 420, 444 (2000), that it was "unnecessary" to reach the § 2254(e)(2) question because the § 2254(d)(1) question had already been resolved adversely to the applicant. Respondent fails to discuss, or even acknowledge, the

impact of this language from *Michael Williams* on this dispute. Respondent's and the *en banc* majority's treatment of § 2254(d) and *Holland* only confirm that this Court should grant certiorari review in this case.

Ironically, respondent himself provides tacit support for petitioner's purportedly radical position that consideration of new facts is irreconcilable with the limitations on federal review and the primacy of state-court determinations codified in § 2254(d)(1). For respondent expends considerable time and energy arguing that petitioner "exaggerates the differences between [respondent's] allegations in state court and his allegations and proof in federal court." Opp. at 19-23. He further implies that some vague, undefined principle of equity should estop petitioner from complaining that respondent developed new facts in federal court, because petitioner was constrained to present new facts in federal court too. Opp. at 23-24. That respondent senses the need to minimize and justify the differences between the facts presented in his state petition and the facts upon which the *en banc* majority based its decision to grant relief suggests an understandable intellectual discomfort with what the *en banc* majority did here.

Respondent further argues that requiring an applicant to pass through the § 2254(d)(1) threshold before permitting the applicant the opportunity to develop evidence would render § 2254(e)(2) superfluous. For, in respondent's untenable view of § 2254(d)(1), an applicant who can prove that a state-court determination was unreasonable without an evidentiary hearing "would be entitled to relief on the present record." Opp. at 39-40. Respondent's misapprehension emphasizes, again, the need for this Court's guidance. Even if an applicant overcomes the threshold bar to relief set up by § 2254(d)(1), he has not yet established the validity of his claim. He then must prove that his crucial allegations of fact are true. With § 2254(d)(1) satisfied, the applicant might do this in an evidentiary hearing—a hearing that only at that point might be necessary and that in any event would be subject to limitations on the

development of new facts in § 2254(e)(2) and to other limitations under (e)(1).

Echoing the *en banc* majority, respondent protests that petitioner's interpretation would place an undue restriction on the federal courts. Opp. at 36-37. According to respondent, this Court should deny certiorari review because there is absolutely nothing wrong with an applicant withholding facts from a state court, waiting to present them for the first time to a federal court, and then accusing the state court of acting unreasonably in failing to grant relief based upon the very material that was withheld—*even if all courts would agree that the state court determination, based on the facts and law presented to the state court, was perfectly reasonable.* Opp. at 38-39.

Respondent's position is also irreconcilable with AEDPA's limitations on the development of new facts never presented to the state court. Section 2254(e)(2) forbids the federal courts from granting an evidentiary hearing as to *any* fact that the applicant failed to develop in state court (subject to exceptions that have no application to the instant case). Here, respondent never alleged in state court that he suffered from organic brain damage, notwithstanding the state court provided him with funding that was used to retain mental health experts who offered opinions to the state court. However, the allegation of organic brain damage, and the evidence in support of that allegation, were the central operative facts that informed the *en banc* majority's decision to grant relief. And respondent failed to present these central operative facts to the state court notwithstanding the multiple opportunities the state court afforded respondent to do so. Instead, respondent presented to the state court other facts; facts the federal evidentiary hearing proved were not true. The *en banc* majority's position, that being denied an evidentiary hearing as to *any* allegation of fact fulfills the requirement of due diligence as to *every* allegation of fact that the applicant might thereafter wish to present in federal court is illogical and unsupportable, and must be corrected.

Under the plain language of § 2254(d)(1), federal courts may only grant relief on the merits of a state-court-adjudicated claim if it was unreasonably rejected by the state courts under clearly established Federal law, and under § 2254(e)(2) an applicant may not bypass the state court process by withholding material facts from the state court. *District Attorney's Office for the Third Judicial District v. Osborne*, 129 S. Ct. 2308, 2324-25 (2009) (Alito, J., concurring). Thus, § 2254(d)(1) requires federal courts to stand in the shoes of the state court and to defer to the state court's determination of the claim if it was reasonable in light of the facts and law presented to the state court. It is only if the state court determination of the claim as presented to the state court was unreasonable that a federal evidentiary hearing under § 2254(e)(2) should even be considered—for, where the state court decision meets the deferential § 2254(d)(1) criteria, relief is barred and a federal evidentiary hearing is beside the point. *Michael Williams*, 529 U.S. at 444.

Under the *en banc* majority's strained construction of the statute, however, § 2254(d)(1) largely will be rendered a nullity, and § 2254(e)(2) will be substantially undermined. Under the *en banc* majority's view, as long as an applicant engages in the simple formality of requesting an evidentiary hearing in state court, he may choose to decline to present relevant, material facts to the state court; for, even if the state court then justifiably denies relief based on the facts alleged rather than withheld, the applicant still would be allowed to move to federal court and add the dispositive new facts to his claim (provided the factual allegation does not render the claim "unexhausted").[1] The

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[1] The *en banc* majority has a new, expansive interpretation of exhaustion principles: as they stated, so long as the new facts inform the same broadly-stated claim, such as "mitigation ineffective assistance" (App. 33-34) the new facts cannot render the claim unexhausted, and evidence in support of those facts must be permitted at the federal evidentiary

(continued...)

applicant, further, would apparently be entitled to an evidentiary hearing—before any § 2254(d)(1) analysis is undertaken—at which he could present new evidence in support of a dispositive factual allegation that he never presented to the state court, and § 2254(e)(2) would not stand in his way. App. 32. Then, following the hearing, the federal court would be free to find that the newly-presented facts the state court never knew about prove that that the state court decision denying relief was "unreasonable" under § 2254(d)(1).

Under the *en banc* majority's rule, no federal court need ever examine the ruling made by the state court "in light of the record the state court had before it." *Contra, Holland v. Jackson*, 542 U.S. at 652. Rather, the state court should, and perhaps even must, consider new facts never presented to the state court in assessing the reasonableness of the state court's determination. In short, the rule the *en banc* majority has articulated permits any federal court that so desires to avoid ever having to show genuine deference to a state court adjudication ever again. This ruling must not be permitted to stand.

II.

Similarly bootless is respondent's attempt to defend the *en banc* majority's analysis of the underlying claim of ineffective assistance of counsel. As pointed out in the petition, trial counsel in the instant case did much more than what counsel did in *Strickland* v. *Washington*, 466 U.S. 668 (1984). And the decision in *Strickland* was almost precisely contemporaneous with the penalty phase of respondent's trial. So it would have been reasonable for the California Supreme Court to rely on

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(...continued)
hearing. The *en banc* majority apparently believes that § 2254(e)(2) did no more than codify some portions of pre-AEDPA exhaustion principles; indeed, given the expansive re-definition of "exhaustion," it did not even do that much.

Strickland for guidance regarding what counsel had an obligation to do under the constitutional minima compelled by the Sixth Amendment, and to deny relief if the conduct of respondent's trial counsel seemed reasonably similar to that of Strickland's counsel.

Respondent is dissatisfied with *Strickland*, however, and chooses to ignore both its underlying facts and the test articulated in that case in favor of other, more recent cases in which relief was granted. However, this Court's opinions in those later cases do not in any way alter or amend the test articulated in *Strickland*. Notwithstanding respondent's belief that there is a different reading of *Strickland* "in the AEDPA era" than there was before (Opp. at 25), this Court could not have been more clear that the cases that respondent discusses were nothing more than straightforward applications of *Strickland* to the particular facts of those cases. *Rompilla* v. *Beard*, 545 U.S. 374, 380-81 (2005); *Wiggins* v. *Smith*, 539 U.S. 510, 521 (2003); *Williams (Terry)* v. *Taylor*, 529 U.S. 362, 367 (2000).

And none of those cases is as instructive on either the standard of care or how to apply the standard of care to respondent's case as *Strickland* itself. Petitioner would concede that other attorneys confronted with other sets of facts who did or did not do other things might have failed to satisfy the *Strickland* standards for performance in ways that were prejudicial to their clients. However, this concession, much like respondent's argument, does nothing to illuminate whether respondent's trial attorneys rendered prejudicially deficient performance. *Strickland* does. And respondent does not even attempt to distinguish *Strickland* from the instant case. That is understandable: there is no reasoned basis for doing so, or for concluding that it would be "unreasonable" to validate the performance of respondent's trial counsel under the *Strickland* test.

Respondent identifies no flaw in petitioner's analysis of the standard of care or the test for prejudice articulated in *Strickland*, or petitioner's

application of *Strickland* to respondent's case. As petitioner explained, given that *Strickland* controls the instant case, and given that trial counsel in *Strickland* did less than what trial counsel in respondent's case did, it certainly would have been reasonable for the California Supreme Court to conclude that what trial counsel did in respondent's case met the constitutional minima discussed in *Strickland*. Further, given the relatively sparse case in aggravation respondent presented to the California Supreme Court, and the aggravated nature of respondent's crimes as magnified by respondent's own testimony at his trial, the state court also reasonably could have concluded that no reasonable juror would have been persuaded to sentence respondent to some lesser punishment.

The California Supreme Court's rejection of respondent's claim of ineffective assistance of counsel was reasonable under *Strickland*; indeed, a fair reading of *Strickland* compels the result reached by the California Supreme Court. This Court should grant certiorari review to correct the *en banc* majority's misunderstanding regarding the deference that must be shown to a state-court determination of a claim of ineffective assistance of counsel.

***

The *en banc* majority misunderstood and misapplied key provisions of the AEDPA amendments to § 2254 in such a way that the plain language and unambiguous intent of that statute are thwarted. The *en banc* majority also failed to show proper deference to the California Supreme Court's reasonable rejection of respondent's claim of ineffective assistance of counsel. This Court has recently evinced interest in both of these important and difficult areas of law. Petitioner asks that this Court take this opportunity provide much-needed clarification and correct the Ninth Circuit's misunderstanding.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: May 24, 2010

Respectfully submitted

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06/17/2010	133 1 pg. 27.05 KB	Received Supreme Court order dated 06/14/2010 Granting Writ of Certiorari. [7408395] [03-99003, 03-99008] (PA)

DECLARATION OF HARRY WILLIAM BRAINARD

I, Harry William Brainard, do hereby declare as follows:

I was trial counsel for Scott Lynn Pinholster in the matter of People v Pinholster, Los Angeles Superior Court No . A800733.

I have reviewed the following documents:

Clarence G. Collins' declaration dated November 16, 1991
R.T. 5649-5652

I was not told that the police had twice submitted the latent print lifted at the crime scene (People's No. 31) to the People's latent fingerprint expert who concluded at those times he could not match Pinholster's known print with that latent. I was not told that only upon a third submission did the People's expert conclude there was a match between the latent and Pinholster's known print.

Had I known the latent print was submitted twice with no match, I would have secured an independent latent fingerprint expert to reanalyze the conclusions of the People's expert.

Had I known Scott Pinholster did not deposit the latent print found at the Kumar residence, I would have conducted the defense differently, and would have appropriately changed my advice to my client. I probably would have advised Scott Pinholster not to testify during guilt phase.

I declare under penalty of perjury that the foregoing is true and correct, except those matters stated on information and belief, and as to those matters I believe them to be true.

DSM-III

Diagnostic and Statistical Manual of Mental Disorders (Third Edition)

Historical

American Psychiatric Association

JOINT APPENDIX

Supreme Court, U.S.
FILED
AUG 9 - 2010
OFFICE OF THE CLERK

No. 09-1088

In the Supreme Court of the United States

VINCENT CULLEN, ACTING WARDEN OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN, *Petitioner*,

v.

SCOTT LYNN PINHOLSTER, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED MARCH 9, 2010
WRIT OF CERTIORARI GRANTED JUNE 14, 2010

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UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA
(Western Division - Los Angeles)
CIVIL DOCKET FOR CASE #: 2:95-cv-06240-GLT

Scott Pinholster v. Jeanne Woodford
Assigned to: Judge Gary L. Taylor
Demand: $0
Cause: 28:1331 Fed. Question

Date Filed: 09/19/1995
Date Terminated: 05/19/2003
Jury Demand: None
Nature of Suit: 535 Death Penalty – Habeas Corpus
Jurisdiction: Federal Question

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DOCKET PROCEEDINGS

Date Filed	#	Docket Text
09/19/1995	1	REQUEST by petitioner Scott Lynn Pinholster for appointment of counsel & for stay of execution of death sentence (bg) (Entered: 09/25/1995)
09/19/1995	2	DECLARATION by petitioner Scott Lynn Pinholster re [1-1] (kr) (Entered: 09/28/1995)
10/24/1995	3	ORDER by Judge Gary L. Taylor execution date of petitioner Scott Lynn Pinholster ; set for 12/8/95 (kr) (Entered: 10/25/1995)
12/06/1995	4	APPLICATION for ext of stay of execution of sent and any

		related proc(s) by petitioner Scott Lynn Pinholster (kr) (Entered: 12/07/1995)
12/07/1995	5	ORDER staying exect by Judge Gary L. Taylor execution date of petitioner Scott Lynn Pinholster ; set for 1/23/96 (ENT 12/12/95) mld cpys no js6 (kr) (Entered: 12/12/1995)
01/22/1996	6	ORDER by Judge Gary L. Taylor execution date of petitioner Scott Lynn Pinholster ; set for 2/22/96 (et) (Entered: 01/23/1996)
01/22/1996	7	APPLICATION for ext of stay of execution of sent and any related proc(s) by petitioner Scott Lynn Pinholster (kr) (Entered: 02/09/1996)
01/22/1996		LODGED/PROPOSED Order (FWD TO CRD) (kr) (Entered: 02/09/1996)
02/27/1996	8	ORDER for ext of stay of exec of sentence and any related proc(s) by Judge Gary L. Taylor execution date of petitioner Scott Lynn Pinholster ; set for 3/25/96 (kr) (Entered: 02/28/1996)
02/27/1996	9	APPLICATION for ext of stay of

		execution of sentence and any related proc(s) by petitioner Scott Lynn Pinholster (kr) (Entered: 03/01/1996)
02/27/1996		LODGED/PROPOSED Order (FWD TO CRD) (kr) (Entered: 03/01/1996)
03/25/1996	10	APPLICATION for extension of stay of execution of sentence & any related procdngs by petitioner Scott Lynn Pinholster (et) (Entered: 03/26/1996)
03/25/1996		LODGED/PROPOSED Order (FWD TO CRD) (et) (Entered: 03/26/1996)
03/25/1996	11	APPLICATION to file recommendation of cnsl under seal by petitioner Scott Lynn Pinholster (et) (Entered: 03/26/1996)
03/25/1996		LODGED/PROPOSED Order (FWD TO CRD) (et) (Entered: 03/26/1996)
03/26/1996	13	ORDER by Judge Gary L. Taylor granting application [10-1] execution date of petitioner Scott Lynn Pinholster ; set for 4/24/96 [ENTERED 4-1-96] Mld all cpys w/notc. (et) (Entered: 04/01/1996)

03/26/1996	14	ORDER to file recommendation of cnsl be fld under seal by Judge Gary L. Taylor (et) (Entered: 04/01/1996)
03/26/1996	15	Recommendation of cnsl [FILED UNDER SEAL] (et) (Entered: 04/01/1996)
03/28/1996	12	MINUTES: Crt & cnsl engage in conference call discuss re possible appointment as cnsl for petitioner. Crt will cause one of its dealth penalty law clerks to contact cnsl re details of representation by Judge Gary L. Taylor CR: None (et) (Entered: 04/01/1996)
04/10/1996	16	ORDER appointing cnsl Michael Snedeker, Snederker, Smith & SHort as appointed co-cnsl to represent petitioner in these H/C penalty procdngs by Judge Gary L. Taylor (et) (Entered: 04/17/1996)
07/24/1996	18	Ex parte APPLICATION for cont stay of execution; decl of Michael D. Abzg by petitioner Scott Lynn Pinholster (kr) (Entered: 07/26/1996)
07/25/1996	17	ORDER by Judge Gary L. Taylor execution date of

		petitioner Scott Lynn Pinholster ; cont for 11/22/96 (kr) (Entered: 07/26/1996)
09/23/1996	19	ORDER by Judge Gary L. Taylor; It is ordered that ptnr sh file his fed ptn for writ of H/C on or before 1/15/97. On or before 2/1/97, ptys sh meet & confer re exhaustion. If resp intends to challenge the exhausted stat of any clm in the ptn, he sh file an appropriate mot on or before 2/15/97. Ptnr will have 10 days to resp to the mot & resp sh have 10 days to ptnr's opp. Crt will take the matter under submission w/out oral argument. Ptnr will have 30 days to file a traverse. Ptn sh file an initial req for funds on or before 10/15/96. (jag) (Entered: 09/26/1996)
09/23/1996	20	ORDER re: Fees & expenses (see doc for details) by Judge Gary L. Taylor (jag) (Entered: 09/26/1996)
10/11/1996	22	APPLICATION for auth to expend greater than $300.00 as reasonably necessary by petitioner Scott Lynn Pinholster (kr) (Entered: 10/17/1996)
10/11/1996		LODGED/PROPOSED Order

		(FWD TO CRD) (kr) (Entered: 10/17/1996)
10/15/1996	21	Ex paret APPLICATION for an ext of time w/in which to file an initial req for funds; decl of Michael D. Abzug UNDER SEAL by petitioner Scott Lynn Pinholster (kr) (Entered: 10/17/1996)
10/15/1996		LODGED/PROPOSED Order (FWD TO CRD) (kr) (Entered: 10/17/1996)
10/15/1996	26	NOTICE of under seal filing by petitioner Scott Lynn Pinholster (kr) (Entered: 10/29/1996)
10/17/1996	27	ORDER that the time w/in which the ptnr must file his initial req for investigative funds is ext to 10/22/96 by Judge Gary L. Taylor (kr) (Entered: 10/29/1996)
10/21/1996	23	AMENDMENT by petitioner Scott Lynn Pinholster to application [22-1] (kr) (Entered: 10/25/1996)
10/21/1996		LODGED/PROPOSED Order (FWD TO CRD) (kr) (Entered: 10/25/1996)
10/22/1996	24	NOTICE of under seal filing by

		petitioner Scott Lynn Pinholster (kr) (Entered: 10/25/1996)
10/22/1996	25	EX PARTE APPLICATION by petitioner Scott Lynn Pinholster for confidential mot for funds for initial investigation for other ancillary svcs UNDER SEAL (kr) (Entered: 10/29/1996)
11/21/1996	28	ORDER by Judge Gary L. Taylor staying execution date of petitioner Scott Lynn Pinholster ; set for 1/15/97 (kr) (Entered: 11/25/1996)
11/21/1996	29	EX PARTE APPLICATION by petitioner Scott Lynn Pinholster for order cont stay of exec Decl of Michael R. Snedeker (kr) (Entered: 11/27/1996)
11/22/1996	30	MINUTES: Approval of Snedekers second interim fee appl by Judge Gary L. Taylor CR: none (kr) (Entered: 11/27/1996)
01/02/1997	31	ORDER Michael Snedeker is auth to spend in excess of $300 but not exceed $750.00 by Judge Gary L. Taylor (kr) (Entered: 01/08/1997)
01/15/1997	32	ORDER by Judge Gary L. Taylor GR funds for H/C

		investigation UNDER SEAL (kr) (Entered: 01/21/1997)
01/15/1997	33	EX PARTE APPLICATION by petitioner Scott Lynn Pinholster for order to stay an exec and to ext the time w/in which the ptnr shall file his fed ptn for writ of h/c decl of Michael D. Abzug (kr) (Entered: 01/21/1997)
01/15/1997	34	refer to case file (kr) Modified on 03/06/1997 (Entered: 01/21/1997)
01/15/1997	34	ORDER that the stay of execution of sentence of death and the time w/i which petr has to file his federal writ of H/C be ext to 4/15/97 by Judge Gary L. Taylor (yt) (Entered: 06/03/1997)
03/18/1997	35	ORDER that an additional $1,750.00 in funds be granted for an initial consultation with Dr. John M. Stalberg by Judge Gary L. Taylor (yt) (Entered: 03/26/1997)
03/18/1997	36	EX PARTE APPLICATION by petitioner Scott Lynn Pinholster for confidential motionfor funds for a consultation with r. John M. Stalberg ****FILED UNDER SEAL**** (yt)

(Entered: 04/08/1997)

03/18/1997	37	NOTICE of under seal filing by petitioner Scott Lynn Pinholster (yt) (Entered: 04/08/1997)
04/07/1997	38	NOTICE of filing under seal by petitioner Scott Lynn Pinholster (yt) (Entered: 04/23/1997)
04/07/1997	44	EX PARTE APPLICATION for additional funds for investigator ****FILED UNDER SEAL**** (yt) (Entered: 05/09/1997)
04/07/1997	45	ORDER on ex parte applic for additonal funds for investigator by Judge Gary L. Taylor ****FILED UNDER SEAL**** (yt) (Entered: 05/09/1997)
04/11/1997	43	EX PARTE APPLICATION by petitioner Scott Lynn Pinholster for order contg stay of execution and extension of time (yt) (Entered: 05/07/1997)
04/11/1997		LODGED/PROPOSED Order (FWD TO CRD) (yt) (Entered: 05/07/1997)
04/14/1997	39	ORDER by Judge Gary L. Taylor that the stay of execution date of petitioner Scott Lynn Pinholster ; set for 4/23/97 ...time w/i which petr

		has to file his federal writ of H/C be ext to 4/23/97 (yt) (Entered: 04/29/1997)
04/21/1997	40	NOTICE of under seal filing by petitioner Scott Lynn Pinholster (el) (Entered: 04/29/1997)
04/21/1997	46	ORDER by Judge Gary L. Taylor ****FILED UNDER SEAL**** (yt) (Entered: 05/09/1997)
04/21/1997	47	EX PARTE APPLICATION by petitioner Scott Lynn Pinholster for confidential motion for funds for a consultation with Dr. John M. Stalberg ****FILED UNDER SEAL**** (yt) (Entered: 05/09/1997)
04/22/1997	41	PETITION FOR WRIT OF HABEAS CORPUS by petitioner Scott Lynn Pinholster in state Custody referred . VOLUME 1 of 2 (yt) (Entered: 05/05/1997)
04/22/1997	42	PETITION FOR WRIT OF HABEAS CORPUS by petitioner Scott Lynn Pinholster in state Custody referred . Volume 2 of 2 (yt) (Entered: 05/05/1997)
05/23/1997	48	NOTICE OF MOTION AND

		MOTION by defendant Arthur Calderon to dismiss petn for failure to exhaust state remedies; stip of cnsl; memo of P/A. (Pur to this Crt's ord of 9-23-96) (et) (Entered: 06/02/1997)
05/23/1997	49	NOTICE of lodging of docs & index of records pur to L/R 26.8.8 by defendant Arthur Calderon (et) (Entered: 06/02/1997)
05/23/1997		LODGED (4) boxes of docs submitted by defendant Arthur Calderon (FWD TO CRD) (et) (Entered: 06/02/1997)
05/30/1997	50	NOTICE of lodging of original stip of cnsl in suppt of mot to dism by defendant Arthur Calderon (et) (Entered: 06/04/1997)
05/30/1997		LODGED 1 Doc submitted by defendant Arthur Calderon (FWD TO CRD) (et) (Entered: 06/04/1997)
06/05/1997	51	EX PARTE APPLICATION filed by petitioner Scott Lynn Pinholster to extension of time w/in which the petitioner may resp to respondent's mot to dismt he petn for failure to exhaust state remedies ; declr of

Michael D. Abzug (et) (Entered: 06/09/1997)

06/05/1997 52 ORDER by Judge Gary L. Taylor granting exparte motion to extension of time w/in which the petitioner may resp to respondent's mot to dismt he petn for failure to exhaust state remedies [51-1] to 6-17-97. (et) (Entered: 06/09/1997)

06/13/1997 53 OPPOSITION to respondent's by petitioner Scott Lynn Pinholster to motion to dismiss petn for failure to exhaust state remedies; [48-1] (et) (Entered: 06/17/1997)

06/20/1997 54 REPLY to petitioner's opposition by defendant Arthur Calderon to motion to dismiss petn for failure to exhaust state remedies; [48-1] (et) (Entered: 06/23/1997)

06/26/1997 55 ERRATA SHEET by petitioner Scott Lynn Pinholster to petitioner's opposition to respondent's mot ot dism petn & notc of mot to establish briefing schedule re exhaustion [53-1]; memo of P/A. (et) (Entered: 07/02/1997)

07/09/1997 56 MINUTES: Crt ORD re montly

		CJA interim vouchers. Pur to G.O. #97-22 of this Crt. Monthly CJA interim vouchers shall be submitted by the 10th business day of the following month & shall include all compensation & expenses claimed for the procdngs month regardless of amt requested. Failure to timely submit monthly CJA interim vouchers may be considered a basis for denying the requested claims by Judge Gary L. Taylor CR: None present (et) (Entered: 07/14/1997)
08/07/1997	57	EX PARTE APPLICATION filed by defendant Arthur Calderon for permission to file a supplemental opp to respondent's mot to dism the petn ; declr of Michael D. Abzug. (et) (Entered: 08/08/1997)
08/07/1997		LODGED/PROPOSED ORDER submitted by petitioner Scott Lynn Pinholster for exparte motion for permission to file a supplemental opp to respondent's mot to dism the petn [57-1] & Oppositions paper.(FWD TO CRD) (et) (Entered: 08/08/1997)
08/20/1997	58	MINUTES: Ntc of intended

		ruling: By his 5-29-97 ltr, Mr. Abzug requested advance notc of the crt's exhaustion ruling in ord to avoid contain statute of limitations problems. It does not apear to the crt tht fur briefing on tht issue would be helpful. However, the crt notifies cnsl tht, 7 days frm the date of this minute ord, the crt will issue the attached exhaustion ord. This will give Mr. Abzug an opportunity to take actn on any limitations issue by Judge Gary L. Taylor CR: Sally Marshall (et) (Entered: 09/02/1997)
08/29/1997	59	AMENDED stipulation of cnsl re exhaustion of state remedies in an ord fld on 9-23-97 by petitioner Scott Lynn Pinholster (et) (Entered: 09/03/1997)
08/29/1997	60	ORDER by Judge Gary L. Taylor GRANT in part DENY in part motion to dismiss petn for failure to exhaust state remedies; [48-1]. The following claims are unexhausted 1,2,58, 75,76 & 77. The parties are requested to not use Roman numerals to designate claims. Petitioner may w/draw the unexhausted claims. Petitioner reqst for equitable tolling as to

		the unexhausted claims is denied as it is not ripe. Crt will address issueing relating to the amendment of the fed petn when petititoner seeks to amend it. Petitioner shall file his unexhausted claims in state crt w/in 30 days of the date of this order. Peititoner is ord to notify the Crt w/in 15 days of any jgm issued by the Calif. Supreme Crt regarding the state habeas petn. [ENTERED 9-3-97] Mld all cpy w/notc. (et) (Entered: 09/03/1997)
10/21/1997	61	NOTIFICATION by petitioner Scott Lynn Pinholster of jgm issued by the Calif Supreme Crt (twdb) (Entered: 10/31/1997)
11/14/1997	62	1ST AMENDED [42-1] PETITION FOR WRIT OF HABEAS CORPUS (yt) (Entered: 11/18/1997)
11/14/1997	63	1ST AMENDED [62-1] PETITION FOR WRIT OF HABEAS CORPUS - Volume 2 of 2 (yt) (Entered: 11/18/1997)
12/11/1997	64	EX PARTE APPLICATION filed by defendant to extention of time which to file respondt's mtn to dism amd pet (mco) (Entered: 12/22/1997)

12/11/1997		LODGED/PROPOSED ORDER submitted by defendant for exparte motion to extention of time which to file respondt's mtn to dism amd pet [64-1] .(FWD TO CRD) (mco) (Entered: 12/22/1997)
12/18/1997	65	ORDER for parties to serve document on death penalty law clerks by Judge Gary L. Taylor (yt) (Entered: 01/07/1998)
01/05/1998	66	ORDER by Judge Gary L. Taylor granting exparte motion to extention of time of 30 dys to & including 1/8/98 which to file respondt's mtn to dism amd pet [64-1] (mco) (Entered: 02/02/1998)
01/09/1998	67	REQUEST by defendant Arthur Calderon to file mtn to dism in excess of 35 pgs; Decl of Kristofer Jorstad (mco) (Entered: 02/02/1998)
01/09/1998		LODGED Mtn & Lodged Ord submitted by defendant Arthur Calderon (FWD TO CRD) (mco) (Entered: 02/02/1998)
01/09/1998	68	NOTICE OF MOTION AND MOTION by defendant Arthur Calderon to dismiss Memo of P's

		& A's in suppt; motion hearing set for 10:00 2/23/98 (mco) (Entered: 02/02/1998)
01/09/1998		LODGED/PROPOSED ORDER submitted by defendant Arthur Calderon for motion to dismiss [68-1] .(FWD TO CRD) (mco) (Entered: 02/02/1998)
01/13/1998	69	ORDER by Judge Gary L. Taylor granting request for perm to file a mtn to dism in excess of 35 pgs [67-1] (mco) (Entered: 02/02/1998)
02/09/1998	70	REQUEST by petitioner Scott Lynn Pinholster for Ext of Time to Reply to Respondt's mtn to dism; Decl of Michael D. Abzug (mco) (Entered: 02/11/1998)
02/11/1998	72	Supplemental MEMORANDUM with new authority by defendant Arthur Calderon IN SUPPORT of motion to dismiss [68-1] (dhl) (Entered: 03/05/1998)
02/23/1998	71	EX PARTE APPLICATION filed by petitioner Scott Lynn Pinholster mot to continue hrg; declr of Michael D. Abzug (et) (Entered: 02/24/1998)
02/23/1998		LODGED/PROPOSED ORDER

		submitted by petitioner Scott Lynn Pinholster for exparte motion mot to continue hrg; [71-1] .(FWD TO CRD) (et) (Entered: 02/24/1998)
02/26/1998	73	ORDER by Judge Gary L. Taylor granting exparte motion mot to continue hrg; [71-1]. The hrg presently sched for 2/23/98 is cont to 4/27/98 at 10:00am. (dhl) (Entered: 03/06/1998)
02/26/1998	74	ORDER by Judge Gary L. Taylor that petr's time to reply to respndt's mot to dism is ext to 3/11/98. (dhl) (Entered: 03/06/1998)
03/10/1998	75	EX PARTE APPLICATION filed by petitioner Scott Lynn Pinholster to extention of time to file a reply to respdents mot to dism ; decl of Michael D. Abzug. (ab) (Entered: 03/25/1998)
03/17/1998	76	ORDER by Judge Gary L. Taylor granting exparte motion to extention of time to file a reply to respdents mot to dism [75-1]; petr Scott Lynn Pinholsters time to reply to respdnets mot to dism is hereby ext to 4-13-98. (ab) (Entered: 03/25/1998)

03/27/1998	77	NOTICE by petitioner Scott Lynn Pinholster of change of address (mco) (Entered: 04/03/1998)
04/17/1998	79	EX PARTE APPLICATION filed by petitioner Scott Lynn Pinholster to exceed page limitation (yt) (Entered: 04/23/1998)
04/17/1998		LODGED/PROPOSED ORDER submitted by petitioner Scott Lynn Pinholster for exparte motion to exceed page limitation [79-1] .(FWD TO CRD) (yt) (Entered: 04/23/1998)
04/20/1998	78	REQUEST to file reply to opp to motn to dism in excess of 35 pages by defendant Arthur Calderon (yt) (Entered: 04/23/1998)
04/20/1998		LODGED/PROPOSED ORDER submitted by defendant Arthur Calderon for request [78-1] .(FWD TO CRD) (yt) (Entered: 04/23/1998)
04/20/1998	80	DECLARATION of Sonja K. Berndt by defendant Arthur Calderon re [68-1] (yt) (Entered: 04/23/1998)

04/20/1998	81	DECLARATION of Sonja K. Berndt by defendant Arthur Calderon re [68-1] volume 2 (yt) (Entered: 04/23/1998)
04/20/1998	85	NOTICE OF DISCREPANCY AND ORDER by Judge Gary L. Taylor that the opp to resp motn to dism rcvd on 4/14/98 is to be fld and processed (yt) (Entered: 04/24/1998)
04/20/1998	86	OPPOSITION by petitioner Scott Lynn Pinholster to motion to dismiss [68-1] (yt) (Entered: 04/24/1998)
04/22/1998	82	ORDER by Judge Gary L. Taylor granting exparte motion to exceed page limitation [79-1] (yt) (Entered: 04/24/1998)
04/22/1998	83	ORDER by Judge Gary L. Taylor that the motion to dismiss [68-1] is submitted; hrg date is vacated (yt) (Entered: 04/24/1998)
04/22/1998	84	REPLY by defendant Arthur Calderon to response to motion to dismiss [68-1] (yt) (Entered: 04/24/1998)
04/24/1998	87	EX PARTE APPLICATION filed by petitioner Scott Lynn Pinholster to continue hrg ; decl

		of Michael D Abzug (el) (Entered: 05/04/1998)
04/24/1998		LODGED/PROPOSED ORDER submitted by petitioner Scott Lynn Pinholster for exparte motion to continue hrg [87-1] .(FWD TO CRD) (el) (Entered: 05/04/1998)
04/27/1998	88	ORDER by Judge Gary L. Taylor granting ptnr's request to fi an oversized brf in resp to mtn to dism [78-1] (el) (Entered: 05/04/1998)
05/04/1998	89	ORDER by Judge Gary L. Taylor that res' mtn to dism the Amd Ptn shl remain under submission pending the flg of addtl briefs. Ptnr shl have until 5/1/98 to fi any addtl legal arguments; res shl have until 6/22/98 to fi any resp thereto. (el) (Entered: 05/06/1998)
05/22/1998	90	Second OPPOSITION by petitioner Scott Lynn Pinholster to motion to dismiss [68-1] first amd petition; Memo of points and authorities (shb) (Entered: 05/26/1998)
05/22/1998	91	Exibits by petitioner Scott Lynn Pinholster to 2nd Opposition to respondents motion to dismiss

		[68-1] first amd petition (shb) (Entered: 05/26/1998)
06/22/1998	92	RESPONSE by defendant Arthur Calderon to petitioner's Opposition to motion to dismiss [68-1] (shb) (Entered: 06/23/1998)
09/03/1998	93	ORDER by Judge Gary L. Taylor GRANT in part DENY in part motion to dismiss [68-1]; The motion is GRANTED as to Claims 50, 59 (prosecutorial misconduct subclaim); and 66 (prosecutorial subclaim, abd DENIED as to Claims 1,2,11,13,16,26,37,61,58, 71,76 and 77 (shb) (Entered: 09/11/1998)
09/08/1998	94	MINUTES: The ert ords respondent to file an answer to the amd federal habeas petition on or before 10/5/98. by Judge Gary L. Taylor CR: N/A (shb) (Entered: 09/15/1998)
09/23/1998	95	EX PARTE APPLICATION filed by defendant Arthur Calderon for unopposed extension of time whithin which to file respondents ans to the amd petition ; Decl of Kristofer Jorstad in suppt thereof; Lodged proposed order (shb)

(Entered: 09/25/1998)

09/30/1998	96	ORDER by Judge Gary L. Taylor granting exparte motion for unopposed extension of time whithin which to file respondents ans to the amd petition [95-1]. Granting ext of tim to and incl 11/4/98 to file an ans to the amd pet. (shb) (Entered: 10/05/1998)
11/04/1998	97	ANSWER filed by defendant Arthur Calderon to Amended Petn for writ of H/C. (et) (Entered: 11/05/1998)
12/09/1998	98	EX PARTE APPLICATION filed by petitioner Scott Lynn Pinholster for an ext of time to file a traverse ; Decl of Michael D. Abzug Lodged proposed order (shb) (Entered: 12/11/1998)
12/10/1998	99	ORDER by Judge Gary L. Taylor granting exparte motion for an ext of time to and incl 1/14/99 to file a traverse ; Decl of Michael D. Abzug [98-1] (shb) (Entered: 12/14/1998)
01/22/1999	100	EX PARTE APPLICATION filed by petitioner Scott Lynn Pinholster for an extension of time to file a traverse ; Decl of

		Michael Abzug Lodged prop order (shb) (Entered: 01/26/1999)
01/27/1999	101	ORDER by Judge Gary L. Taylor granting exparte motion for an extension of time to 2/15/99 to file a traverse [100-1]; (shb) (Entered: 02/02/1999)
02/18/1999	102	TRAVERSE by petitioner Scott Lynn Pinholster to respondents answer to Mr. Pinholster's fed pet for writ of h/c [97-1] (shb) (Entered: 02/23/1999)
03/08/1999	103	EX PARTE APPLICATION filed by petitioner Scott Lynn Pinholster for an ext of time to file a motion for an evidentiary hearing ; Decl of Michael Abzug; Lodged prop ord (shb) (Entered: 03/11/1999)
03/18/1999	104	ORDER by Judge Gary L. Taylor granting exparte motion for an ext of time to and incl 4/5/99 to file a motion for an evidentiary hearing [103-1] (shb) (Entered: 03/22/1999)
04/15/1999	105	EX PARTE APPLICATION filed by petitioner Scott Lynn Pinholster to expand the time within which petitioner may file a moiton for an evidentiary

		hearing ; Decl of Michael Abzug Lodged prop ord (shb) (Entered: 04/19/1999)
04/20/1999	106	REQUEST by petitioner Scott Lynn Pinholster for evidentiary hearing; memo of points and authorities (shb) (Entered: 04/22/1999)
04/20/1999	107	ORDER by Judge Gary L. Taylor that petitioners mot for evidentiary hearing my be filed on 4/12/99/ Respondents opp shall be filed on 5/12/99 (shb) (Entered: 04/22/1999)
04/20/1999	108	NOTICE OF DISCREPANCY AND ORDER by Judge Gary L. Taylor that the req for evid hrg; meme PA received on 4/13/99 is to be filed and processed (shb) (Entered: 04/23/1999)
04/22/1999	109	NOTICE OF DISCREPANCY AND ORDER by Judge Gary L. Taylor re doc ex parte applic for permission to bill services received on 4-19-99 & ORD the doc is NOT to be fld, but instead rejected, & is ORD returned to cnsl. (ct) (Entered: 04/27/1999)
05/06/1999	110	EX PARTE APPLICATION filed by defendant Arthur Calderon for unopposed

		extension of time w/in which to file respondent's objs to reqst for evidentiary hrg & mot for S/J; declr of Kristofer Jorstad in supprt Lodged Prop Ord (et) (Entered: 05/07/1999)
05/17/1999	111	ORDER by Judge Gary L. Taylor granting exparte motion for unopposed extension of time to anincl 7/13/99 w/in which to file respondent's objs to reqst for evidentiary hrg & mot for S/J; declr of Kristofer Jorstad in supprt [110-1] (shb) (Entered: 05/24/1999)
07/07/1999	112	EX PARTE APPLICATION filed by defendant Arthur Calderon for extension of time within which to file respondents objections to request for evidentiary hearing and motion for summary judgment Decl of Kristofer Jorstad; Lodged prop ord (shb) (Entered: 07/14/1999)
07/12/1999	113	ORDER by Judge Gary L. Taylor granting exparte motion for extension of time within which to file respondents objections to request for evidentiary hearing and motion for summary judgment [112-1]. Respondents ex parte appl for an ext of time to and incl

		9/13/99, within which to file a combined mot for s/j and obj to petitioners req for evidentiary hrg. (shb) (Entered: 07/15/1999)
09/02/1999	114	EX PARTE APPLICATION filed by defendant Arthur Calderon for unopposed extension of time within which to file respondent's objections to request for evidentiary hearing and motion for summary judgment ; Decl of Kristofer Jorstad in suppt thereof; Lodged prop ord (shb) (Entered: 09/03/1999)
09/14/1999	115	ORDER by Judge Gary L. Taylor granting exparte motion for unopposed extension of time to and incl 9/27/99 within which to file respondent's objections to request for evidentiary hearing and motion for summary judgment [114-1] (shb) (Entered: 09/22/1999)
09/27/1999	116	EX PARTE APPLICATION filed by defendant Arthur Calderon to exceed page limitation Memo of points and authorities in suppt of mot for s/j and opp to req for evidentiary htf; Decl of Kristofer Jorstad; Lodged ord (shb) (Entered: 09/29/1999)

09/27/1999		LODGED mot papers submitted by defendant Arthur Calderon (FWD TO CRD) (shb) (Entered: 09/29/1999)
09/29/1999	117	ORDER by Judge Gary L. Taylor granting exparte motion to exceed page limitation [116-1] (dmjr) (Entered: 10/01/1999)
09/29/1999	118	NOTICE OF MOTION AND MOTION by defendant Arthur Calderon for summary judgment (dmjr) (Entered: 10/01/1999)
11/10/1999	119	ORDER by Judge Gary L. Taylor that petr to file a reply re his req for evidentiary hrng & an opp to resp's mot for summ jgm by 11/30/99; resp's rply re his mot for summ jgm is due on 12/14/99; the crt will take both matters under sumb aft that date (rmi) (Entered: 11/15/1999)
11/18/1999	120	EX PARTE APPLICATION filed by petitioner Scott Lynn Pinholster to extend time to file reply to respondents mot for s/j and to file opp to respondents request for evidentiary hearing to and incl 1/15/00 Lodged prop ord (shb) (Entered: 11/22/1999)

11/19/1999	121	ORDER by Judge Gary L. Taylor tht the time w/in which petr Scott Lynn Pinholster has to file his reply to respdents mot for S/J and opp to his req for an evid hrging is ext to 1-15 2000. (ab) (Entered: 11/24/1999)
01/11/2000	122	EX PARTE APPLICATION filed by petitioner Scott Lynn Pinholster to extend the time w/in which to file petr's rply to resp's mot for summ jgm & opp to petr's req for an evid hrg ; decl of Michael R Snedeker (rmi) (Entered: 01/12/2000)
01/11/2000	123	ORDER by Judge Gary L. Taylor granting exparte motion to extend the time w/in which to file petr's rply to resp's for summ jgm & opp to petr's req for an evid hrg [122-1]; ord that the time w/in which petr Scott Lynn Pinholster has to file his rply to resp's mot for jgm & opp to his req for an evid hrg is ext thru 3/15/00; fur ord that resp file any rply to petr's opp to itms mot for summ jgm by 4/14/00 (rmi) (Entered: 01/12/2000)
02/11/2000	124	ORDER by Judge Gary L. Taylor re further extensions of

		time, the crt hereby advises the ptys that the crt will not gr future requests for ext of time on these motions (see doc for specifics) (rmi) (Entered: 02/14/2000)
03/15/2000	125	NOTICE OF MOTION AND MOTION by petitioner Scott Lynn Pinholster for summary judgment ; supptg PA (rmi) (Entered: 03/17/2000)
03/15/2000	126	OPPOSITION by petitioner Scott Lynn Pinholster to motion for summary judgment [118-1]; stmt of gen issues; rply to opp to req for evid hrg (rmi) (Entered: 03/17/2000)
03/16/2000	127	NOTICE OF DISCREPANCY AND ORDER by Judge Gary L. Taylor, that mot for summ jgm, prop stmt & opp to mot for summ jgm is ord to be filed & processed; ntc of filing of orig signatures to be filed w/in 7 days (rmi) (Entered: 03/17/2000)
03/17/2000	128	NOTICE OF DISCREPANCY AND ORDER by Judge Gary L. Taylor that ntc of change of address is not to be filed, but instead rejected & is ord ret to cnsl (rmi) (Entered: 03/20/2000)

03/21/2000	129	ORIGINAL SIGNATURE PAGE re motion for summary judgment [125-1] by petitioner Scott Lynn Pinholster (ab) (Entered: 03/24/2000)
03/30/2000	130	NOTICE OF CHANGE Of Address filed by atty Scott Lynn Pinholster for petitioner Scott Lynn Pinholster (ab) (Entered: 04/06/2000)
04/14/2000	136	REPLY by defendant Arthur Calderon to opposition to motion for summary judgment [125-1] (shb) (Entered: 05/05/2000)
04/17/2000	131	OPPOSITION by respondent to petr's motion for summary judgment [125-1] (rmi) (Entered: 04/18/2000)
04/17/2000	132	NOTICE OF DISCREPANCY AND ORDER by Judge Gary L. Taylor that respondent's opp to mot for summ jgm is ord to be filed & processed (rmi) (Entered: 04/18/2000)
04/17/2000	133	EX PARTE APPLICATION filed by defendant Arthur Calderon to to file an oversized memo of points and authorities in opp to petitioners mot for s/j decl of Kristofer Jorstad in

		suppt; Lodged prop ord (shb) (Entered: 04/20/2000)
04/20/2000		PLACED IN FILE - NOT USED (proposed) statement of uncontroverted facts and conclusions of law & order (shb) (Entered: 04/21/2000)
04/21/2000	134	ORDER by Judge Gary L. Taylor granting exparte motion to to file an oversized memo of points and authorities in opp to petitioners mot for s/j [133-1] (shb) (Entered: 04/26/2000)
05/01/2000	135	ORDER by Judge Gary L. Taylor that the record lodged w/the crt in this case is missing pgs 328-348 of the clrk's transc suppl #1; the crt directs resp to ldg these missing pgs firthwith; (see doc for specifics) (rmi) (Entered: 05/02/2000)
05/10/2000	137	NOTICE of Lodging of Pages Missing From the Record; Decl of Kristopher Jorstad; lodged 1 envelope w/CRD (yl) (Entered: 05/15/2000)
05/16/2000	138	REPLY by petitioner Scott Lynn Pinholster to response to motion for summary judgment [125-1] (yl) (Entered: 05/18/2000)

06/01/2000	139	EX PARTE APPLICATION filed by petitioner Scott Lynn Pinholster for hearing date on the ptys mots for S/J ; decl of Michael D. Abzug. Lodged PROPSD ,ORD. (ab) (Entered: 06/05/2000)
06/05/2000	140	ORDER by Judge Gary L. Taylor directing resp to lodge transcripts of 5/13/83 & 3/14/84 exparte hrgs; (see doc for specifics) (rmi) (Entered: 06/07/2000)
06/06/2000	141	MINUTES (In Chambers):in resp to petr's exparte motion for hearing date on the ptys mots for S/J, the crt declines to set a hrg at this time [139-1]; the crt is currently preparing various mot matters that have been raised by the ptys & upon completion of that preparation, will sched a hrg if necessary; by Judge Gary L. Taylor CR: Sally Marshall (rmi) (Entered: 06/07/2000)
06/08/2000		PLACED IN FILE - NOT USED (Proposed) order (shb) (Entered: 06/12/2000)
06/15/2000	142	ORDER by Judge Gary L. Taylor directing; resp to lodge doc referred to by petr as "RJN";

		(see doc for specifics) (rmi) (Entered: 06/16/2000)
06/20/2000	143	NOTICE by defendant Arthur Calderon of ldging of additional docs, decl of Kristofer Jorstad in suppt. (ab) (Entered: 06/22/2000)
08/14/2000	144	ORDER by Judge Gary L. Taylor that petr has filed a req for evid hrg & both ptys have filed motions for summ jgm; in resolving these matters, the crt has consid the papers filed in suppt of & in opp to the motions, the state crt record & the fed & state habeas petitions & exhs; the crt hereby gr a hrg re clms 58, 64 & 66, reserves ruling re clms 59, 62, 63, a portion of clm 70, 72 & 73 & gr respondent's mot for summ jgm on all remain clms; (see doc for specifics) (rmi) (Entered: 08/15/2000)
08/29/2000	145	ORDER tht the time w/in which the parties hv to notify the crt if they are ready for an evidentiary hrg is extended frm 8/28/00 to 9/11/00 by Judge Gary L. Taylor (ca) (Entered: 08/30/2000)
08/29/2000	146	STIPULATION filed to extend

		evidentiary hrg from 8/28/00 to 9/11/00 (yl) (Entered: 08/31/2000)
09/14/2000	147	JOINT STATEMENT by petitioner Scott Lynn Pinholster of readiness for evid hrging. (ab) (Entered: 09/19/2000)
09/26/2000	148	ORDER on joint stmt of readiness for evid hrg by Judge Gary L. Taylor: The evidentiary hearing will be held on 9:00 3/27/01 ; the ptys shall file a jt stip re discov by 11/14/00; discov shall be completed by 1/30/01; the ptys shall file wit list & exh list by 2/6/01; the direct testimony of all wits will be revd in the form of written narrative stmts only; these stmts must be signed under the penalty of perjury & filed by 2/6/01; any motions in limine contain obj to exhs or wits shall be filed by 2/20/01; opps are due by 3/6/01 & rplies are due by 3/13/01; the ptys must file a nte w/the crt indicating whether they intend to cross exam any of the wits by 2/20/01; pre-hrg br are due by 3/13/01; a pre-hearing set on 9:00 3/19/01 ; (see doc for fur specifics) (rmi) (Entered: 09/27/2000)

12/05/2000	149	EX PARTE APPLICATION filed by petitioner Scott Lynn Pinholster to schedule an evid hearing ; decl of Michael D. Abzug. Lodged ORD. (ab) (Entered: 12/08/2000)
12/11/2000	150	STIPULATION and ORDER by Judge Gary L. Taylor re respdents righ to srv req for production of docs by petr and to issue subpoenaes duces tecum to thrid pty wits(see doc for fur details). (ab) (Entered: 12/15/2000)
01/05/2001	151	MINUTES IN CHAMBERS before Judge Gary L. Taylor ; At petr's req, the 3/27/01, evidentiary hrg is resched for 9:00am on 9/4/01 and the pre-hearing conference is h/b resched for 1:00pm on 8/22/01. CR: none present (mt) (Entered: 01/09/2001)
01/19/2001	152	STIPULATED REQUEST by defendant Arthur Calderon to modify briefing/deadline sched (rmi) (Entered: 01/25/2001)
01/25/2001	153	ORDER by Judge Gary L. Taylor ; discovery ddl set on 7/3/01 ; IN COURT HEARING RE: evid hrging set on 9:00 9/4/01 ; the ptys shall file wit

		list and exh list by 7-11-01. (ab) (Entered: 01/29/2001)
04/04/2001	154	EX PARTE APPLICATION filed by petitioner Scott Lynn Pinholster for permission to bill for the services of Attys Kami J. White and Lisa R. Short (pbap) (Entered: 04/09/2001)
04/13/2001	155	EX PARTE APPLICATION filed by petitioner for funds for consultation with Dr Stalberg (dmjr) (Entered: 04/19/2001)
04/16/2001	156	ORDER by Judge Gary L. Taylor granting exparte appl for permission to bill for the services of Attys Kami J. White and Lisa R. Short [154-1] (rrey) (Entered: 04/23/2001)
04/25/2001	157	ORDER by Judge Gary L. Taylor granting exparte motion for funds for consultation with Dr Stalberg [155-1]; ord that Dr. John M. Stalberg is auth to spend an addtl 10 hrs to prepare for his testimony at the evid hrg in the above-captioned case at a rate of $75.00 per hr; Dr. Stalberg shall keep detailed records of the time expended purs to this ord & shall not exceed an addtl 10 hrs w/out fur written auth frm the crt (rmi)

(Entered: 05/01/2001)

05/07/2001	158	EX PARTE APPLICATION filed by petitioner Scott Lynn Pinholster for amended order for additional funds for consultation with Dr John Stalberg ; Declaration of Michael Abzug; Lodged proposed order (shb) (Entered: 05/10/2001)
05/14/2001	159	AMENDED ORDER by Judge Gary L. Taylor that the 4/25/01 ord auth Dr. John M. stalber to spend an addl 10 hrs to prepare his testimony at the evid hrg at rate of $75.00 per hr is amend to reflect a rate of $175.00 an hr; Dr. Stalberg shall (see doc for specifics) (rmi) (Entered: 05/24/2001)
07/11/2001	161	EXHIBIT list by petitioner Scott Lynn Pinholster and Witness list and Declarations of F David Rudnick, MD, and Peter M Williams (shb) (Entered: 07/17/2001)
07/11/2001	162	DECLARATION of Witnesses by petitioner Scott Lynn Pinholster (shb) (Entered: 07/17/2001)
07/11/2001	163	EXHIBIT list by petitioner

		Scott Lynn Pinholster (shb) (Entered: 07/17/2001)
07/13/2001	160	Original DECLARATION of Peter M Williams; Curricumulum Vitae of David Rudnick, M.D. filed by defendant Arthur Calderon (shb) (Entered: 07/13/2001)
07/26/2001	164	ORDER by Judge Gary L. Taylor: Ptys submitted a stip re the sched of depos in this case. Crt denies the ptys' req but ext the discovery cut-off date until 8/22/01. Ptys also must submit the direct testimony decl of their witnesses to the crt by that date. (SEND) (mt) (Entered: 07/27/2001)
07/26/2001	170	STIPULATED EX PARTE APPLICATION filed to continue evidentiary hrg and DCO and to subst cnsl ; decl of Michael D. Abzug; stip. (gk) (Entered: 09/28/2001)
08/01/2001	165	NOTICE by dft Jeanne Woodford of intent to cross-examine wits. (gk) (Entered: 08/02/2001)
08/01/2001	166	NOTICE OF MOTION AND MOTION by dft Jeanne Woodford in limine to exclude &

		strike certain exhs w/ objs to petr's exhs & wits; memo of PA. (gk) (Entered: 08/02/2001)
08/07/2001	167	EX PARTE APPLICATION filed by petr Scott Lynn Pinholster for funds w/ which to retain an expert atty to testify at petr's evidentiary hrg . Lodged Proposed Order (Fwd to CRD) (gk) (Entered: 08/09/2001)
09/04/2001	168	MINUTES (In Chambers): Strickland experts not needed: it will not be necessary for the crt to receive testimony frm Strickland expert; therefore, the crt strikes respondet's Strickland expert frm the wit list & denies petr's ex parte application for funds w/ which to retain an expert atty to testify at petr's evidentiary hrg [167-1] by Judge Gary L. Taylor CR: none present (rmi) (Entered: 09/07/2001)
09/04/2001	171	ORDER by Judge Gary L. Taylor upon the stipulated ex parte application to continue evidentiary hrg and DCO [170-1] and to subst cnsl [170-2], attorney Michael D. Abzug is relieved as cnsl for resp Scott Lynn Pinholster and substituting attorney Maria E.

		Stratton, Office of the Federal Public Defender, in his place. ; IN COURT HEARING RE: Evidentiary Hrg set on 9:00 1/22/02 ; pre-hrg conference set for 1:00 1/9/02 ; discovery shall be completed by 11/14/01 , wit/exh lists & mots in limine shall be fld by 11/21/01. (gk) (Entered: 09/28/2001)
09/04/2001	172	STIPULATION and ORDER by Judge Gary L. Taylor re scheduling of depos of John Stalberg, M.D. and any expert wits designated by the ptys. (gk) (Entered: 09/28/2001)
09/14/2001	169	ORDER by Judge Gary L. Taylor re respondent's mot in limine & mod pre-hrg sched; the crt hereby modifieds the pre-hrg sched as fol: as prev ord, discov must be completed by 11/14/01; the ptys also must file their lists of wits & exhs by 11/21/01; addtly, by that date, petr must incl an offer of proof re ea wit on his wit list & resp to respondent's mot inlimine filed on 8/1/01; the final deadline for subm any addtl motions in limine is 12/5/01 (rmi) (Entered: 09/19/2001)
09/21/2001		PLACED IN FILE - NOT USED

		petr Scott Lynn Pinholster's prop ord, lodged 8/7/01. (gk) (Entered: 09/27/2001)
10/12/2001	173	EX PARTE APPLICATION filed by petr Scott Lynn Pinholster to continue evidentiary hrg & discov completion dates ; decl of Dean R. Gits. Lodged Proposed Order (Fwd to CRD) (gk) (Entered: 10/16/2001)
10/19/2001	174	ORDER by Judge Gary L. Taylor granting ex parte application to continue evidentiary hrg & discov completion dates [173-1] ; discovery ddl set on 2/13/02 ; IN COURT HEARING RE: evidentiary hearing set on 4/23/02 ; status conference set for 4/10/02 ; cont deadline for filing of the wit/exh list & motions in limine is cont to 2/20/02 (rmi) (Entered: 10/30/2001)
01/28/2002	175	UNOPPOSED EX PARTE APPLICATION filed by petr Scott Lynn Pinholster to continue evidentiary hrg & discov completion dates ; decl of Dean R. Gits. Lodged Proposed Order (Fwd to CRD) (gk) (Entered: 01/29/2002)

02/13/2002	176	ORDER by Judge Gary L. Taylor granting ex parte application to continue evidentiary hrg & discov completion dates [175-1]; ord IN COURT HEARING RE: evidentiary hearing cont to 9/10/02 ; pre-hrg conference cont to 8/28/02 ; discovery ddl is cont to 7/29/02 ; (see doc for fur specifics) (rmi) (Entered: 02/20/2002)
02/21/2002	177	MINUTES (In Chambers): the ptys are directed to servea cpy of all future pldgs on the Death Penaly Law Clerk at 312 N. Spring St. Rm 810 Los Angeles CA 90012; by Judge Gary L. Taylor CR: none present (rmi) (Entered: 02/27/2002)
07/18/2002	178	UNOPPOSED EX PARTE APPL filed by petitioner Scott Lynn Pinholster for order advancing date for prehearing conference previously set in this mtr to either Mon 8/26/02 or Friday 8/23/02 at a time of day convenient to this Crt ; Decl of Dan R Gits (wm) (Entered: 07/25/2002)
08/08/2002	179	Amended PROOF OF SERVICE by defendant on 8/7/02 of stip &

		ord re sched of depos (dmjr) (Entered: 08/14/2002)
08/12/2002	181	MOTION by petitioner to prohibit introduction of direct testimony of Lay Witness by deposition of expert witness (dw) (Entered: 08/15/2002)
08/12/2002	182	WITNESS list submitted by petitioner (dw) (Entered: 08/15/2002)
08/12/2002	183	MOTION by petitioner in limine to admit the decls of Harry Brainard (dw) (Entered: 08/15/2002)
08/12/2002	184	EXHIBIT list by petitioner (dw) (Entered: 08/15/2002)
08/12/2002	185	WITNESS list submitted by dft Jeanne Woodford. (gk) (Entered: 08/21/2002)
08/12/2002	186	EXHIBIT list by dft Jeanne Woodford. (gk) (Entered: 08/21/2002)
08/13/2002	180	MINUTES (In Chambers) by Judge Gary L. Taylor: Re pending pre-hearing motions. Petr's motions concerning the evidence from Dr Stahlberg and Mr Brainard will be taken up at the pre-hearing conference (see

		doc for specifics) CR: Not Present (mt) (Entered: 08/14/2002)
08/13/2002	187	STIPULATION and ORDER by Judge Gary L. Taylor for resp to take the deposition upon oral exam of Sheryl Duvall, or Sheryl Zigmond ; discovery cutoff date ext to 8/22/02 for the limited purpose of completing the deposition . Such deposition may be noticed in the Los Angeles area for any mutually convenient date on or bef 8/22/02. (gk) (Entered: 08/21/2002)
08/13/2002	188	STIPULATION and ORDER by Judge Gary L. Taylor that the depo of Dr. David Rudnick will take place on 8/9/02, in Los Angeles, CA; depo of Dr. Donald Olson will take place on 8/16/02, in Los Angeles, CA; depo of Dr. Sophia Vinogradov will take place on 8/19/02, in Los Angeles, CA. (gk) (Entered: 08/21/2002)
08/14/2002	189	ORDER by Judge Gary L. Taylor upon unopposed ex parte application for order advancing date for prehearing conference [178-1] ; pre-hrg conference reset for 9:00 8/23/02 . (gk) (Entered: 08/21/2002)

08/21/2002	190	OPPOSITION by dft Jeanne Woodford to petr's motion in limine to prohibit introduction of direct testimony of "lay witness" by deposition of expert witness [181-1]. (gk) (Entered: 08/27/2002)
08/21/2002	191	OPPOSITION by dft Jeanne Woodford to petr's motion in limine to admit the decls of Harry Brainard [183-1]. (gk) (Entered: 08/27/2002)
08/21/2002	192	NOTICE OF MOTION AND MOTION by resp Jeanne Woodford in limine w/ objs to petr's exhs & wits ; memo of PA. (gk) (Entered: 08/27/2002)
08/22/2002	193	MOTION by petr Scott Lynn Pinholster to strike resp's mot in limine re exhaution . (gk) (Entered: 08/29/2002)
08/23/2002	195	MINUTES: Petitioner's motion in limine to prohibit the testimony of Dr Stahlberg [181-1] is argued & DENIED on the condition that Dr Stahlberg be made available for depo & the expert rpts provided; Petitioner's mot in limine to admit the decls of Harry Brainard [183-1] is argued &

		GRANTED; Mot Re exhaustion is denied w/out prej to being renewed at the time of trial; Crt & cnsl discuss trial mechanics; Evidentiary hrg remains set for 9/10/02 at 9:00 am by Judge Gary L. Taylor; CR: Sally Marshall (nhac) (Entered: 09/04/2002)
08/26/2002	194	NOTICE by dft Jeanne Woodford of lodging of decl of Sheryl Zigmond as exh N. (gk) (Entered: 09/03/2002)
08/26/2002	200	NOTICE by petr Scott Lynn Pinholster of lodgment of decls of petr's percipient wits; attached decls. (gk) (Entered: 09/20/2002)
09/03/2002	196	NOTICE by petr Scott Lynn Pinholster of lodgment of decls of petr's expert wits; attached decls; ntc of withdrawal of certain percipient decls. (gk) (Entered: 09/09/2002)
09/03/2002	201	NOTICE by dft Jeanne Woodford of lodging Exh O (decl of F. David Rudnick, M.D.). (gk) (Entered: 09/20/2002)
09/03/2002	202	NOTICE by dft Jeanne Woodford of lodging Exh P (decl of John M. Stalberg M.D.). (gk)

(Entered: 09/20/2002)

09/10/2002	197	MINUTES by Judge Gary L. Taylor: ; discovery cut-off satisfied ; in court hearing re 1st day evidentiary hearing held . Opening stmts waived by both sides. Wits CST. Exhs identified. CR: Sally Marshall. (gk) (Entered: 09/19/2002)
09/11/2002	198	MINUTES by Judge Gary L. Taylor: 2nd day evidentiary hrg held. Opening stmts waived by both sides. Wits CST. Exhs identified. Exhs admitted. CR: Sally Marshall. (gk) (Entered: 09/19/2002)
09/12/2002	199	MINUTES by Judge Gary L. Taylor: 3rd day evidentiary hrg held. Wits CST. Exhs identified. Exhs admitted. Petr rests. Resp rests. Closing brief by petr to be fld & faxed or personally served on resp on or bef 10/15/02. Resps brief shall be fld & faxed or personally served on petr on or bef 11/15/02. Petrs final brief shall be fld & faxed or personally served on resp on or bef 12/2/02 whereupon the matter will stand submitted. CR: Sally Marshall. (gk) (Entered: 09/19/2002)

09/12/2002	203	LIST OF EXHIBITS & WITS. (gk) (Entered: 09/20/2002)
09/12/2002	203	LIST OF EXHS & WITNESSES. (gk) (Entered: 09/20/2002)
10/15/2002	204	POST-HEARING BRIEF FILED by petr Scott Lynn Pinholster. (gk) (Entered: 10/22/2002)
10/18/2002	221	RECEIPT OF TRANSCRIPT of proceedings for the following date(s): 9/10/02, 9/11/02, 9/12/02 (Re:) CR: Sally R. Marshall (dlu) (Entered: 06/02/2003)
10/18/2002		TRANSCRIPT filed for proceedings held on 9/10/02 (dlu) (Entered: 06/02/2003)
10/18/2002		TRANSCRIPT filed for proceedings held on 9/11/02 (dlu) (Entered: 06/02/2003)
10/18/2002		TRANSCRIPT filed for proceedings held on 9/12/02 (dlu) (Entered: 06/02/2003)
11/15/2002	205	MINUTES (in chambers) by Judge Gary L. Taylor: Resp's Mot for Leave to File a Post-Hrg Brief in Excess of 25 pages is GRANTED; brief shall be deemed filed as of the date of

		this Ord; CR: none present (ln) (Entered: 11/18/2002)
11/15/2002	207	POST HRG BRIEF FILED by defendant Jeanne Woodford (wm) (Entered: 11/20/2002)
11/15/2002		PLACED IN FILE - NOT USED; Propsd Ord lodged 11/15/02 (wm) (Entered: 11/20/2002)
11/15/2002	208	EX PARTE MOTION by resp Jeanne Woodford for lv to file a post-hrg brief in excess of 25 pages ; decl. Lodged Proposed Order (Fwd to CRD) (gk) (Entered: 11/22/2002)
11/18/2002	206	NOTICE OF CLERICAL ERROR: Min Ord filed 11/15/02 ICMS enter date is changed from 11/25/02 to 11/18/02 (ln) (Entered: 11/18/2002)
12/02/2002	209	REPLY by petitioner Scott Lynn Pinholster to Resp's post hrg brief [207-1] (wm) (Entered: 12/06/2002)
03/25/2003	210	ORDER by Judge Gary L. Taylor granting writ of habeas corpus: Following recent Ninth Circuit authority, the writ of habeas corpus is granted concerning Petitioner's death

		sentence for inadequacy of defense counsel in investigating and presenting mitigation evidence at the penalty phase of petitioner's trial. (see document for further specifics) (mt) (Entered: 03/27/2003)
03/26/2003	211	JUDGMENT AND ORDER by Judge Gary L. Taylor: It is hereby ordered, adjudged and decreed that Petitioner Scott Lynn Pinholster's First Amended Petition for Writ of Habeas Corpus is GRANTED with respect to his sentence of death and DENIED with respect to remaining claims; Further ordered that the State of California shall VACATE and SET ASIDE the sentence of death unless within 90 days of the entry of judgment herein the State of California grants Pinholster a new trial regarding sentencing. If the State does not elect to retry Pinholster, the Superior Court shall VACATE his sentence of death and resentence him in accordance with applicable California law and United States Constitution (mt) (Entered: 03/27/2003)
04/03/2003	212	ADDENDUM TO ORDER GRANTING WRIT by Judge

		Gary L. Taylor: (see document for specifics) (mt) (Entered: 04/03/2003)
04/18/2003	213	NOTICE OF APPEAL by respondent Jeanne Woodford to 9th C/A from Dist. Court Judgment and Order filed 3/26/03 and entered 3/27/03 [211-1], Order filed 4/3/03 and entered 4/3/03 [212-1], Order filed 3/25/03 and entered 3/27/03 [210-1] (cc: Richard S. Moskowitz; Dean Gits, DFPD; Snedeker, Smith and Short) Fee: Paid. (pjap) (Entered: 04/18/2003)
04/22/2003	214	ORDER ON RESPONDENT'S Request for Stay Pending Appeal by Judge Gary L. Taylor: respondent has filed request to stay the Court's Order Granting Writ of Habeas Corpus while he pursues an appeal; Court grants a stay for 30 days from date of this Order to allow respondent time to request a further stay from Court of Appeals; Court notes that portion of 90-day period for State of California to provide Petitioner with new sentencing trial has already elapsed; IT IS SO ORDERED (ln) (Entered: 04/23/2003)

04/23/2003	215	NOTICE OF APPEAL/ Representation Statement by petitioner Scott Lynn Pinholster to 9th C/A from Dist. Court judgment filed 03/26/03 [211-1]. (cc: Dean R. Gits, DFPD; Michael R. Snedeker, Snedeker, Smith & Short; State Attorney General) COA Pending. (cbr) (Entered: 04/25/2003)
04/23/2003	216	REQUEST filed by respondant Jeanne Woodford to stay case pending appeal ; Memorandum of points and authorities in support thereof; Supporting declaration of Richard S. Moskowitz (twdb) (Entered: 04/25/2003)
04/25/2003	218	TRANSCRIPT DESIGNATION and ordering form for dates: 09/10/02, 09/11/02, 09/12/02, CR: S. Marshall. (03-99003) (cbr) Modified on 04/30/2003 (Entered: 04/30/2003)
04/30/2003	217	NOTIFICATION by Circuit Court of Appellate Docket Number appeal [213-1] 03-99003. (cbr) (Entered: 04/30/2003)
05/01/2003	219	TRANSCRIPT DESIGNATION and ordering form for dates:

		None requested. [215-1] (cbr) (Entered: 05/01/2003)
05/19/2003	220	ORDER by Judge Gary L. Taylor re certificate of appealability; (see document for further specifics); terminating case (MD JS-6) (mt) (Entered: 05/22/2003)
06/02/2003	222	CERTIFICATE of Record Transmitted to USCA (cc: all parties) (dlu) (Entered: 06/02/2003)
06/02/2003	223	CLERK'S record on appeal transmitted to Circuit [215-1] vols: 16, transcripts: 3, 1 bulky document No. 118. (Not included document Nos. 109, 112, 114); 5 boxes of state lodged documents) (dlu) Modified on 06/03/2003 (Entered: 06/02/2003)
03/20/2009	224	ORDER from 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals, 213 , CCA # 03-99003. is The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit. (dmap) (Entered: 03/24/2009)
12/16/2009	225	ORDER from 9th CCA filed re: Notice of Appeal to 9th Circuit

		Court of Appeals, 213 , CCA # 03-99003 and 03-99008. Respondent's Motion for Stay of Mandate for ninety days from the entry of judgment is GRANTED. (cbr) (Entered: 12/18/2009)
06/29/2010	226	APPEAL RECORD RETURNED from 9th CCA Received: Volume(s): 1 through 16; Transcripts(s): 3; BF: 118 and 5 Boxes of State Lodged Docs. RE: Appeal Record Sent to USCA (A-26) 223 (car) (Entered: 06/30/2010)
08/03/2010	227	TRANSCRIPT for proceedings held on 08/23/01, 9:00 a.m.. Court Reporter: Sally Marshall, phone number (805) 423-0104. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through sally.e@charter.net or PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 8/24/2010. Redacted Transcript Deadline set for 9/3/2010. Release of Transcript Restriction set for 11/1/2010.

		(Parker, Deborah) (Entered: 08/03/2010)
08/03/2010	228	NOTICE OF FILING TRANSCRIPT filed for proceedings 08/23/01, 9:00 a.m. (Parker, Deborah) (Entered: 08/03/2010)

General Docket
United States Court of Appeals
for the Ninth Circuit

Docketed: 06/25/2003
Termed: 12/09/2009

Court of Appeals Docket #: 03-99008
Nature of Suit: 3535 Habeas Corpus: Death Penalty
Pinholster v. Woodford
Appeal From: U.S. District Court for Central California, Los Angeles
Fee Status: IFP

- -

Case Type Information:
1) prisoner-death penalty
2) state
3) death penalty habeas corpus

- -

Originating Court Information:
District: 0973-2 : CV-95-06240-GLT
Court Reporter: Dawn Bullock, Court Reporter
Trial Judge: Gary L. Taylor, District Judge
Date Filed: 09/19/1995

Date Order/Judgment:	Date NOA Filed:
03/27/2003	04/23/2003

- -

Prior Cases:

97-15185
Date Filed: 02/05/1997
Date Disposed: 03/17/1998
Disposition: Affirmed – Memorandum

97-17056
Date Filed: 10/30/1997
Date Disposed: 10/26/1998

Disposition: Affirmed – Memorandum

Current Cases:

Lead	Member	Start	End
Cross-Appeal			
03-99003	03-99008	06/25/2003	

- -

SCOTT LYNN PINHOLSTER (-: Reg.#C-87601)
Petitioner - Appellant,

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v.

JEANNE S. WOODFORD, of the California
State Prison at San Quentin
Respondent – Appellee,

James William Bilderback, II,
Supervising Deputy Attorney General
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Los Angeles, CA 90013

- -

SCOTT LYNN PINHOLSTER,

Petitioner - Appellant,

v.

JEANNE S. WOODFORD, of the California State Prison at San Quentin,

Respondent - Appellee.

06/25/2003	[1]	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. (COA granted in part and denied in part in USDC on 5/19/03) (EU)
06/25/2003	[3]	Filed original and 4 copies Scott Lynn Pinholster's motion for Broader Certificate of Appealability and Memorandum and Points; Srved on 6/23/03. (DP-Staff/ATTY) [03-99003, 03-99008] (PA)

06/26/2003	⌐ 4	Filed order MOATT (ME) The briefing schedule set on 4/23/03 is vacated. Respondent's response to Petitioner's motion for a broader certificate of appealability (COA) is due on 7/30/03. A new briefing schedule will be set at the time the motion for a broader COA is decided. (Faxed and Served Csls) [03-99003, 03-99008] (PA)
07/31/2003	⌐ 5	Filed Appellant Jeanne S. Woodford's response to Petitioner's Motion for Broader COA entitled "Respondent's Notice of Non-Opposition to Petitioner's Motion for Broader COA; served on 7/28/03. (DP-Staff/Atty) [03-99003, 03-99008] (PA)
08/07/2003	⌐ 6	Criminal Justice Act voucher sent (Voucher #) to Michael R. Snedeker for Appellant Scott Lynn Pinholster in 03-99008 [03-99008] (CB)
09/18/2003	⌐ 16	Filed order (Betty B. FLETCHER, Barry G. SILVERMAN, Kim M. WARDLAW): Petitioner moves for a broader certificate of appealability (COA) to appeal seven additional issues. Respondent does not oppose the

motion. Although Respondent contends that the issues are meritless, Respondent does not state that they are so lacking in merit that they are undebatable. Accordingly, Petitioner's unopposed motion for a broader COA, which raises on its face seven debatable constitutional issues, is granted. See Miller-El v. Cockrell, 123 S.Ct. 1029, 1039-40(2003). The briefing schedule is set as follows: Respondent's opening brief and excerpts of record are due 10/30/03; Petitioner's combined answering and opening brief and his supplemental excerpts of record are due 12/16/03; Respondent's combined reply and answering brief is due 1/20/04; Petitioner's optional reply brief, if any, is due within 14 days from service of Respondent's combined brief. All briefs shall conform to federal and local rules.(Served Csls) [03-99003, 03-99008] (PA)

10/24/2003 ⌐ 8 Filed Respondent Jeanne S. Woodford's motion for an extension of time to file first cross-appeal brief until 12/14/03; served on 10/22/03. (dpc) [03-99003, 03-99008] [03-99003, 03-99008] (PA)

10/28/2003	⌐ 9	Filed order (Deputy Clerk: pi) The respondent's unopposed motion for a 45-day extension of time within which to file the opening brief on cross-appeal is granted. The respondent-appellant's opening brief and excerpts of record are now due on 12/15/03; the petitioner's combined brief in response to the opening brief and his opening brief on cross appeal is due 01/14/04; and the respondent's combined reply brief and brief in response to petitioner's opening brief is due 2/13/04. The petitioner's reply brief may be filed within 14 days of respondent's responsive brief. All briefs must conform with Federal Rules of Appellate Procedure and Circuit Rule 32-1 and 32-4. (Served to Csls) [03-99003, 03-99008] (PA)
11/06/2003	⌐ 10	CJA-30 voucher received and returned to counsel: premature. He prefers to wait & submit interim billing after briefing is complete. Issued another voucher for him to use at that time. (SA)
12/08/2003	⌐ 11	Filed Respondent-Appellant's second unopposed motion for extension of time to 1/29/04 to file firste cross-appeal brief; served

		on 12/5/03. (DP-Staff/Atty) [03-99003, 03-99008] [03-99003, 03-99008] (PA)
12/11/2003	⌐ 13	Filed order MOATT (ME) Respondent's second unopposed motion for a 45-day extension of time to file its opening brief is granted. Respondent's opening brief and excerpts of record are due on 1/29/04. Petitioner's combined opening and responsive brief and his excerpts of record are due 3/19/04. Respondent's combined responsive and reply brief is due 4/28/04. Petitioner's optional reply, if any, is due within 14 days from service of Respondent's combined brief. All briefs shall conform to federal and local rules. (Served and Faxed to Csls) [03-99003, 03-99008] (PA)
01/07/2004	⌐ 15	Received Petitioner Scott Lynn Pinholster's PRO SE Motion for Broader Certificate of Appealability; served on 1/5/04. (Petitioner represented by Csl)[DP-Staff/Atty] [03-99003, 03-99008] ****(6/9/05: Pro Se Motion Striken by ORDER of June 9, 2005)**** (PA)
01/30/2004	⌐ 17	Filed original and 15 copies Jeanne S. Woodford's first brief

		on cross-appeal of 90 pages (20,413 words) and an original and 5 copies of excerpts of record in 5 volumes; served on 1/29/04. (RECORDS) [03-99003, 03-99008] (PA)
02/25/2004	⌐ 18	Received Appellant Scott Lynn Pinholster's Ex Parte Motion for Appointment of Appeal Counsel; served on 2/22/04. (DP-Staff/Atty) [03-99003, 03-99008] ****(6/9/05: Ex Parte Motion Striken by ORDER of June 9, 2005)**** (PA)
03/16/2004	⌐ 19	Received Appellee Scott Lynn Pinholster's letter dated 3/11/04 re: Requesting a copy of the Court's docket sheet to be sent to him. (Caselfiles) [03-99003, 03-99008] (PA)
03/16/2004	⌐ 20	Sent Petitioner Pinholster copy of public docket sheet per request on 3/11/04. [03-99003, 03-99008] (PA)
03/17/2004	⌐ 21	Filed original and copies of Scott Lynn Pinholster's Motion for an extension of time to 5/4/04 to file second cross-appeal brief; served on 3/16/04. (dpc) [03-99003, 03-99008] [03-99003, 03-99008] (PA)
03/19/2004	⌐ 22	Filed order (Deputy Clerk: pi) Petitioner's unopposed motion for

extension of time within which to file his combined responsive brief and opening-brief on cross-appeal is GRANTED. The petitioner's responsive brief and opening brief are now due on 5/4/04; respondent's combined reply brief and brief in response to petitioner's opening brief is due 6/3/04; petitioner's reply brief, if any, may be filed within 14 days of respondent's responsive brief. (Phoned, Faxed and Served to Csls) [03-99003, 03-99008] (PA)

05/04/2004 ⌐ 23 Filed original 5 copies Scott Lynn Pinholster's motion to extend time to 6/29/04 to file combined opening brief and responsive brief or second cross-appeal brief and declaration in support of, served on 5/3/04. (DP/Staff-Atty) [03-99003, 03-99008] (EU)

05/06/2004 ⌐ 24 Filed order MOATT (ME) Petitioner's second unopposed motion for an extension of time, until 6/29/04, to file his combined opening brief and responsive brief is granted. Respondent's combined responsive and reply brief is due 8/24/04, Petitioner's optional reply, if any, is due within fourteen days from service of Respondent's combined brief. (notified csl) [03-99003, 03-99008]

(EU)

06/24/2004 ⌐ 25 Filed Petitioner Scott Lynn Pinholster's Third Motion for Extension of Time to 07/28/04 to File Second Cross-Appeal brief; served on 06/23/04. (DP-Staff/Atty) [03-99003, 03-99008] [03-99003, 03-99008] (PA)

06/28/2004 ⌐ 26 Filed order MOATT (ME) Pettioner's third unopposed motion for an extension of time, until July 28, 2004, to file his combined and responsive brief is granted. Respondent's combined responseive and reply brief is due September 23, 2004. Petitioner's optional reply, if any, is due within twenty-onde days from service of Respondent's combined brief. (Faxed/Served to Csls) [03-99003, 03-99008] (PA)

07/28/2004 ⌐ 27 Filed Petitioner Scott Lynn Pinholster's 4th Motion for Extension of time to 8/4/04 to file second cross-appeal brief; served on 7/27/04. (DP-Staff/Atty) [03-99003, 03-99008] (PA)

07/28/2004 ⌐ 28 Filed order MOATT (ME) Petitioner's motion for an additional sevens days, until 08/04/04, to file his combined opening brief and responsive is

granted. Respondent's combined responsive and reply brief and its excerpts of record, if any, are due 10/04/04. Petitioner's optional reply, if any, is due within 21 days from service of Respondent's combined brief. (Fax/Served and Phoned Csls) [03-99003, 03-99008] (PA)

08/05/2004 ⌐ 29 Filed Petitioner Pinholster's Motion to File Oversized Combined brief; Attached Proposed Brief of 24,328 Words; Served on 8/4/04. (DP-Staff/Atty) [03-99003, 03-99008] [03-99003, 03-99008] (PA)

08/05/2004 ⌐ 30 Received Petitioner Scott Lynn Pinholster's oversized 2nd cross-appeal brief of 110 pages (24,328 words); served on 08/04/04. (Motion to File Oversize Pending w/DP-St/Atty) [03-99003, 03-99008] (PA)

08/06/2004 ⌐ 31 Filed order MOATT (ME) Petitioner's motion to file an oversized combined responsive and opening brief is denied. Petitioner's combined brief, conforming to the size limitations of Ninth Circuit Rule 32-4, is due September 10,2004. Respondent's combined reply and responsive brief is due November 10, 2004.

		Petitioner's optional reply, if any, is due within 21 dyas from service of Respondent's combined brief. (Phoned/Faxed/Served to Csls) [03-99003, 03-99008] (PA)
08/19/2004	⌐ 32	Received Appellee Scott Lynn Pinholster's dated 8/17/04 re: Request for updated docket sheet and Request Order or Ruling regarding Pro Se Motion for Broader COA. (Casefiles) (Sent updated docketsheet on 8/31/04) [03-99003, 03-99008] (PA)
09/14/2004	⌐ 33	Filed original and 15 copies of Scott Lynn Pinholster's second-cross appeal brief of 90 pages (20,917 words) and excerpts of record in 2 volumes. (Records) [03-99003, 03-99008] (PA)
10/13/2004	⌐ 35	Filed atty Michael R. Snedeker ex parte motion for interim CJA pymt (APP COMM w/ CJA voucher) (SA)
10/22/2004	⌐ 34	Received Petitioner Pinholter's PRO SE motion to take judicial notice of judicial records; served on 10/20/04 to AG and FPD. (DP-Staff/Atty) [03-99003, 03-99008] (PA)
11/03/2004	⌐ 36	Filed original and 5 copies of Respondent's motion for

		extension of time to 12/9/04 to file third cross-appeal brief; served on 11/2/04. (DP-Staff/Atty) [03-99003, 03-99008] [03-99003, 03-99008] (PA)
11/03/2004	37	Filed order (Appellate Commissioner) Due to clerical oversight, petitioner's pro se motion for broader certificate of appealability and petitioner's pro se motion for appointment of new counsel, received by the court on 01/7/04 and 02/22/04 respectively, have not yet been addressed. Although the court does not entertain pro se motion from represented parties, the issues raised in the pro se motions warrant a response from petitioner's counsel. The Clerk shall serve petitioner's counsel with copies of both motions. Within 14 days after the date of this order, petitioner's counsel shall file a response addressing the points raised in the pro se motions. Petitioner's counsel may move to file the response under seal if appropriate. The briefing schedule set forth in the deputy clerk's order of 8/6/04 is suspended. (Served Csls by fax/mail and Petitioner by mail.) [03-99003, 03-99008] (PA)

11/03/2004	⌐ 38	Sent letter to Petitioner Scott Pinholster (deputy:me): Stating the Court declines to entertain Pro Se Motion for Judicial Notice received by this court on 10/20/04, because petitioner is represented by counsel. A copy of Pro Se motion will be sent to petitioner's csls. (Served Petitioner, Ptr's Csls by mail) [03-99003, 03-99008] (PA)
11/03/2004	⌐ 39	Filed order MOATT (ME) In light of the Appellate Commissioner's 11/3/04 order suspending briefing, Respondent's motion, servd on 11/2/04, for an extension of time to file its combined responsive and reply brief is denied as moot. (Faxed/Mailed it Csls) [03-99003, 03-99008] (PA)
11/24/2004	⌐ 40	Filed notice of representation of Sean K. Kennedy and Anthony J. Cavalluzzi for Petitioner Scott Lynn Pinholster; Served on 11/22/04. (DP-Staff/Atty, App-Comm., and Casefiles) [03-99008, 03-99003] (PA)
11/24/2004	⌐ 41	Filed Petitioner Pinholster's Motion for Extension of Time to File Csl's Response to Petitioner's Pro Se Motions. (Response Late); served on 11/22/04. (DP-Staff/Atty, and App.Comm) [03-

99008, 03-99003] [03-99008, 03-99003] (PA)

11/30/2004 ⌐ 42 Filed order (Appellate Commissioner) Petitioner's motion for an extension of time to file counsels' response to petitioner's pro se motions is granted. The response is due January 18, 2005. (Phoned/Faxed/Served Csls) [03-99003, 03-99008] (PA)

12/01/2004 ⌐ 43 Filed order (Appellate Commissioner) The motion of appellant's appointed counsel, Michael R. Snedeker, Esq., for interim payment under the CJA is granted. The voucher has been certified for the full amount claimed, as audited by the Clerk. Within 45 days after the final disposition of the case in this court or after the filing of a petition for a writ of certiorari, whichever is later, counsel may submit a final voucher seeking payment of any further compensation sought. (Operations) [03-99003, 03-99008] (DL)

01/10/2005 ⌐ 44 Filed Anthony J. Cavalluzzi's (Atty for Petitioner) Motion For Extension of time to File Counsel's Response to Petitioner's

Pro Se Motions; Served on 1/7/05. (DP-Staff/Atty) (PA)

01/18/2005 45 Filed order (Appellate Commissioner) Counsel's second motion for extension of time to file a response to Petitioner's pro se motions is granted. Counsel's response is due 3/21/05. (Faxed/Served to Csl) [03-99003, 03-99008] (PA)

03/22/2005 46 Filed Anthony J. Cavalluzzi and Sean K. Kennedy (Attys for Petitioner) Third Motion for Extension of Time (60 days or May 20, 2005) to File Counsel's Response to Petitioner's Pro Se Motions; Served on 3/21/05. (DP-Staff/Atty) (PA)

03/24/2005 47 Filed order (Appellate Commissioner) Counsel moves for a third extension of time to file a response to Petitioner's pro se motions. Counsel does not anticipate requesting any further extensions. Counsel's motion is granted. The response is due on May 20, 2005. (phoned/faxed/served csl) [03-99003, 03-99008] (PA)

05/23/2005 48 Received Petitioner's Csl's Response to Court's 3/24/05 Order entitled Csl's Response to PRO

		SE Motion for Broader COA and Pro Se Motion for Appointment; Served on 5/20/05. (Response Late, Mtn Needed; Contacted Csl Mtn to follow) [DP-Staff/Atty] [03-99003, 03-99008] (PA)
05/25/2005	49	Filed Petitioner's Atty's FAXED Motion to Late Response to Court's Order for Csl's Response to Pro Se Motion for Broader COA and Pro Se Mtn for Appointment; Served on 5/25/05. (DP-Staff/Atty) (Response to Crt's Order Rcvd 5/23/05) [03-99003, 03-99008] [03-99003, 03-99008] (PA)
06/09/2005	50	Filed order (Appellate Commissioner) Counsel's motion to file a late response to the pro se motions is granted. Pursuant to counsel's response, the request to withdraw the February 25,2004 pro se motion for appointment of new counsel is granted. The pro se motion for broader certificate appealability shall be addressed as follows. The court amended its rules, effective January 1, 2004, to eliminate the use of a motion for broader certificate of appealability by requiring that uncertified issues be raised under separate heading in Petitioner's opening brief. See

		9th Cir. R. 22-1(e) (See Order for text).....Accordingly, the Clerk shall strike Petitioner's January 7, 2004 pro se motion for a broader certificate of appealability and counsel's September 14, 2004 combined opening and answering brief. Counsel's combined opening and answering replacement brief, raising appropriate uncertified issues in the manner required Ninth Circuit Rule 22-1(e), is due on July 12, 2005. Respondent's combined answering and reply brief is due September 12,2005. Petitioner's optional reply brief, if any, is due within 21 days after service of Respondent's combined brief. (Phoned/Faxed/Served Csl) [03-99003, 03-99008] (PA)
07/05/2005	⌐ 51	Filed original and copies of Petitioner's Motion for Extension of Time to 8/27/05 to File Second Cross-Appeal Replacement Brief; Served on 7/1/05. (DP-Staff/Atty) [03-99003, 03-99008] [03-99003, 03-99008] (PA)
07/08/2005	⌐ 52	Filed order MOATT (ME) Petitioner's unopposed motion for an extension of time to file his combined opening and answering replacement brief is granted; that brief is due 8/29/05. Respondent's

		combined answer and reply brief is due 10/28/05. Petitioner's optional reply, if any, is due within 21 days from service of Respondent's combined brief. (Faxed/Served Csl) [03-99003, 03-99008] (PA)
08/23/2005	⌐ 53	Filed Petitioner Scott Lynn Pinholster's Motion for Extension of Time to 11/28/05 to file Combined Opening and Answering (second cross-appeal) replacement brief; served on 8/22/05. (DP-Staff/Atty) [03-99003, 03-99008] (PA)
08/25/2005	⌐ 54	Filed order MOATT (ME) Petitioner's unopposed motion for a 90-day extension of time, until 11/28/05, to file his combined opening and answering replacement brief is granted. Respondent's combined answer and reply brief is due 2/3/06. Petitioner's optional reply, if any, is due within 21 days after service of Respondent's combined brief. (Faxed/Served Csl) (PA)
11/28/2005	⌐ 55	Filed "faxed" copy Scott Lynn Pinholster's final unopposed motion for extension of time to file petitioner's combined opening and answering replacement brief until 12/12/05, and declaration in

		support of, served 11/28/05. (DP-STAFF/ATTY) (orig. copy rec'd on 11/29/05 for casefile)[03-99003, 03-99008] (EU)
11/28/2005	⌐ 56	Filed order MOATT (ME) Petitioner's unopposed mtn for a 14 day extension of time, until 12/12/05, to file his combined opening and answering replacement brief is granted. Respondent's combined answer and reply brief is due 2/17/06. Petitioner's optional reply, if any, is due within 21 days after service of respondent's combined brief. (phoned to csl @ 3:45 p.m) [03-99003, 03-99008] (EU)
12/14/2005	⌐ 57	Filed Original and Copies of Petitioner Pinholster's Second Brief on Cross-Appeal of 91 pages or 23,200 words with 5 copies of 1 volume Supplemental Excerpts of record; Served on 12/12/05. (Records) [03-99003, 03-99008] (PA)
02/13/2006	⌐ 58	Filed Respondent's motion for extension of time to 04/17/06 to file third cross-appeal brief; served on 2/9/06. (DP-Staff/Atty) [03-99003, 03-99008] (PA)
02/15/2006	⌐ 59	Filed order MOATT (ME) Respondent's unopposed motion

		for a 60-day extension of time to file its combined answer and reply brief is granted. Respondent's combined brief is due April 18, 2006. Petitioner's optional reply, if any, is due within 21 days after service of Respondent's combined brief. (Faxed/Served Csl) [03-99003, 03-99008] (PA)
04/10/2006	⌐ 60	Filed Respondent's Unopposed motion for second extensionof time to 6/19/06 to file respondent's combined answer and reply brief; served on 4/7/06. (Served to DP-Staff/Atty) [03-99003, 03-99008] (PA)
04/12/2006	⌐ 61	Filed order MOATT (ME) Respondent's second unopposed motion for an extension of time, until June 20, 2006, to file its combined answer and reply brief is granted. Petitioner's optional reply, if any, is due within 21 days after service of Respondent's combined brief. (Phoned/Faxed to Csl) [03-99003, 03-99008] (PA)
06/13/2006	⌐ 62	Filed Respondent's Motion for Extension of Time to 8/19/06 to file third cross-appeal brief; Served on 6/12/2006. (DP-Staff/Atty) [03-99003, 03-99008] , served on [03-99003, 03-99008]

(PA)

06/14/2006	⌐ 63	Filed order MOATT (ME) Respondent's third unopposed motion for an extension of time to file its combined answer and reply brief is granted. Respondent's combined brief is due August 22, 2006. Petitioner's optional reply, if any, is due within 21 days after service of Respondent's combined brief. (Phoned/Faxed/Served Csl) [03-99003, 03-99008] (PA)
08/23/2006	⌐ 64	Filed Respondent's cross-appeal motion to file oversized combined reply brief (xap3 brief) of 72 pages (15,522 words); served on 8/22/06. (DP-Staff/Atty) [03-99003, 03-99008] [03-99003, 03-99008] (PA)
08/23/2006	⌐ 65	Received original and 15 copies of Respondent's 3rd cross-appeal brief of 72 pages (or 15,522 words); served on 8/22/06. (Motion to File Oversize Pending w/DP-Staff-Atty) [03-99003, 03-99008] (PA)
09/12/2006	⌐ 66	14 day oral extension by phone of time to file Petitioner's reply brief. Reply brief is now due 9/28/06. [03-99003, 03-99008] appellants' reply brief due ; (PA)

09/13/2006 ⌐ 67 Filed order MOATT (ME) Because Respondent's combined brief comprised of 15,522 words is both an answering brief and a reply brief, Respondent's motion for leave to file an oversized combined brief is denied as unnecessary. See 9th Cir.R. 32-4 (permitting 21,000 words for principal briefs in capital cases.) The Clerk shall file Respondent's combined brief, received on August 23, 2006. (Faxed/Served Csl) [03-99003, 03-99008] (PA)

09/14/2006 ⌐ 68 Filed original and 15 copies of Respondent's third brief on cross-appeal of 71 pages or 15,522 words; Served on 8/22/06. (See Court's 9/13/06 Order)[Cvrsht of Brief has wrong color, Csl sending corrected brief coversht.)[As of 9/18/06 Received and Replaced Cvrsht of Respondent's 3rd cross-appeal brief] [03-99003, 03-99008] (PA)

09/29/2006 ⌐ 69 Filed original and 15 copies of Petitioner's cross-appeal reply brief of 19 pages or 4,774 words; served on 9/28/06. (RECORDS)) of 19 pages; served on 9/28/06 [03-99003, 03-99008] (PA)

09/29/2006 ⌐ Received Petitioner's PRO SE

	70	Motion entitled "Pro-Se Application" for Stay of All Proceedings In this Ocurt Pending Resolution of Performance of DNA Testing; Served on 9/26/06. (DP-Staff/Atty) [03-99003, 03-99008] (PA)
10/06/2006	72	Filed order (Appellate Commissioner) On September 29,2006, the court received petitioner's pro se motion to stay appellate proceedings pending resolution of petitioner's application in state court for DNA testing. Because petitioner is represented by counsel, only counsel may submit filings, and this court therefore declines to entertain the motion. The Clerk shall serve a copy of the prose motion on appellant's counsel of record for whatever action counsel deems appropriate. Petitioner is reminded that parties represented by counsel ordinarily must communicate with the court through counsel. (Served Csl and Petitioner) [03-99003, 03-99008] (PA)
10/17/2006	73	Filed Petitioner's Motion to Take Judicial Notice; Served on 10/13/06. (DP-Staff/Aty) [03-99003, 03-99008] [03-99003, 03-99008] (PA)

11/13/2006	⌐ 74	Filed order MOATT (ME) Petitioner's 10/17/06 Request for judicial notice is referred to the merits panel for such consideration as it deems appropriate. (Faxed/Served Csl) [03-99003, 03-99008] (PA)
11/28/2006	⌐ 76	Calendar check performed [03-99003, 03-99008] (AW)
12/06/2006	⌐ 77	CALENDARED: Univ of WASH School of Law Apr 11 2007 10:00 am Magnuson/Jackson Moot Ctrm [03-99003, 03-99008] (AW)
04/02/2007	⌐ 78	Filed fax copy of Scott Lynn Pinholster's additional citations, served on 4/2/07. (Original and Copies to follow by mail)[Faxed/Served to Panel] [03-99003, 03-99008] (PA)
04/11/2007	⌐ 79	ARGUED AND SUBMITTED TO Alex KOZINSKI, Raymond C. FISHER, Richard C. TALLMAN [03-99003, 03-99008] (KM)
05/02/2008	⌐ 82 79 pg. 366.8 8 KB	FILED OPINION (ALEX KOZINSKI, RAYMOND C. FISHER and RICHARD C. TALLMAN) AFFIRMED IN PART; REVERSED IN PART; VACATED; REMANDED. [Affirmed in Part and

		Reversed/Vacated in Part;Terminated on the merits after oral hearing;Written, reasoned, signed, published; Judge: AK Concurring, Judge: RCF Dissenting, Judge: RCT Authoring (Panel involvement data updated for cases: 03-99003)]. FILED AND ENTERED JUDGMENT. [03-99003, 03-99008] (RP)
05/08/2008	83	Filed Appellant Scott Lynn Pinholster's motion for extension of time to 6/30/08 to file petition for rehearing and rehearing en banc; served on 5/7/08. [03-99003, 03-99008] (PA)
05/12/2008	84 1 pg, 22.34 KB	Filed order (RICHARD C. TALLMAN) The motion for an extension of time of 45 days to June 30, 2008, to file a petition for rehearing en banc is granted. (PA)
06/24/2008	85	Filed Appellant 'a motion to extend time to file petition for rehearing until 07/15/2008. Served on 06/23/2008. [03-99003, 03-99008] (Panel) (PA)
06/30/2008	86 1 pg,	Filed order (RICHARD C. TALLMAN) Granting Appellant's Motion to extend time to file petition for rehearing. Petition for

	24 15 KB	rehearing en banc shall be filed with the Clerk of Court no later than 7/15/08. No further extensions will be granted. [03-99003, 03-99008] (PA)
07/15/2008	⌐ 87	Filed original and 50 copies of Petitioner Pinholster's s petition for panel rehearing and petition for rehearing en banc Number of Pages 19. (or 4,122 words); Served on 07/12/2008. Date circulated to the court: 07/15/2008 (PANEL-ACTIVE JUDGES-ANY INTERESTED SENIOR JUDGES) [03-99003, 03-99008] (PA)
07/21/2008	⌐ 88 1 pg, 23 38 KB	Filed order (RICHARD C. TALLMAN) The Respondent shall file a response to the petition for rehearing and suggestion for rehearing en banc not exceeding fifteen (15) pages in length setting forth its position on whether this case should be reheard en banc. Fifty (50) copies of the brief shall be filed within thirty (30) days from the date of this order. (PA)
08/19/2008	⌐ 89	Filed original and 50 copies of Respondent's response to Petition for panel and en banc rehearing of 15 pages or 3382 words; served pm 8/18/08. Date circulated to the

		court:08/20/2008 (PANEL-ACTIVE JUDGES-ANY INTERESTED SENIOR JUDGES) PLEASE NOTE: THE ATTACHED DOCUMENT IS A DOCUMENT INTERNAL TO THE COURT AND IS NOT ACCESSIBLE ON PACER OR ECF. [03-99003, 03-99008]--[Edited 08/19/2008 by PA]-- (PA)
03/20/2009	⌐ 90 1 pg, 28.5 KB	Filed Order for PUBLICATION (ALEX KOZINSKI) Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit. [03-99003, 03-99008] (RP)
03/20/2009	⌐ 91 4 pg, 23.87 KB	Filed (ECF) notice of appearance of JAMES WILLIAM BILDERBACK II for Appellee Jeanne S. Woodford. Date of service: 03/20/2009. [6854149] (JWB)
03/25/2009	⌐ 92	Added attorney James William Bilderback II for Robert L. Ayers Jr., in case 03-99003 James William Bilderback II for Jeanne S. Woodford, in case 03-99008. [03-99003, 03-99008] (PA)

03/25/2009	⌐ 93 - 2 pg, 30.43 KB	Filed order (ALEX KOZINSKI) [03-99003, 03-99008]En banc oral argument will take place during the week of June 22, 2009, in Seattle, Washington. The date and time will be determined by separate order. Within seven days from the date of this order, the parties shall forward to the Clerk of Court thirty additional copies of the original briefs and excerpts of record. (PA)
03/26/2009	⌐ 94	CALENDARED: week of 06/22/2009 --exact date & time to be determined via further order; Seattle, WA, Nakamura Cthse, 8th Floor [03-99003, 03-99008] (AM)
03/30/2009	⌐ 95	Received Petitioner's 30 copies of orginal brief and EOR per Court's Order of 3/25/09. [03-99003, 03-99008] (PA)
05/29/2009	⌐ 99 - 1 pg, 9.68 KB	Filed order (ALEX KOZINSKI) Oral argument in this en banc case will be held at 10:00 a.m. on Tuesday, June 23, 2009, in the 8th Floor Courtroom at the William K. Nakamura U.S. Courthouse, located at 1010 Fifth Avenue, Seattle, Washington 98104. http://www.ca9.uscourts.gov/information/locations.php [03-99003,

03-99008] (AW)

05/29/2009	⌐ 97	UPDATED CASE CALENDARED: 06/23/2009 10:00 AM Seattle, WA SE Nakamura Cthse 8th Floor Courtroom [03-99003, 03-99008] (AW)
05/29/2009	⌐ 98 6 pg, 51.58 KB	Notice of en banc Oral Argument on JUNE 23 2009 Seattle Calendar. Please return ACKNOWLEDGEMENT OF HEARING NOTICE form to: SEATTLE Office. Attention: Please open attached documents to view details about your case. [03-99003, 03-99008] (AW)
06/09/2009	⌐ 100 1 pg, 24.31 KB	Filed clerk order (Deputy Clerk:PA):Courtroom View Network applied to videotape in digital format for later broadcast, the case captioned above, scheduled to be heard at Nakamura Courthouse, Seattle, WA, on Tuesday, June 23, 2009. The majority of Judges on the En Banc Court have voted to grant the application. Courtroom View Network's request to videotape in digital format for later broadcast is GRANTED. (PANEL) [03-99003, 03-99008] (PA)
06/11/2009	⌐ 101	Filed (ECF) Appellant Robert L. Ayers, Jr. in 03-99003 citation of

	3 pg, 45.69 KB	supplemental authorities. Date of service: 06/11/2009. [6952999] [03-99003, 03-99008] (JWB)
06/23/2009	102	ARGUED AND SUBMITTED TO ALEX KOZINSKI, HARRY PREGERSON, STEPHEN R. REINHARDT, PAMELA ANN RYMER, ANDREW J. KLEINFELD, KIM MCLANE WARDLAW, WILLIAM A. FLETCHER, RICHARD A. PAEZ, MARSHA S. BERZON, JAY S. BYBEE and MILAN D. SMITH, JR. [6966357] [03-99003, 03-99008] (SB)
06/25/2009	103	Filed (ECF) Appellee Scott Lynn Pinholster in 03-99003, Appellant Scott Lynn Pinholster in 03-99008 citation of supplemental authorities. Date of service: 06/25/2009. [6969871] [03-99003, 03-99008] (SKK)
	3 pg, 99.24 KB	
11/18/2009	104	Filed (ECF) Appellant Robert L. Ayers, Jr. in 03-99003, Appellee Jeanne S. Woodford in 03-99008 citation of supplemental authorities. Date of service: 11/18/2009. [7134336] [03-99003, 03-99008] (JWB)
	3 pg, 253.6 KB	
12/09/2009	105	UPDATED ENTRY - FILED EN BANC OPINION (ALEX KOZINSKI, HARRY

	137 pg, 913.4 3 KB	PREGERSON, STEPHEN R. REINHARDT, PAMELA ANN RYMER, ANDREW J. KLEINFELD, KIM MCLANE WARDLAW, WILLIAM A. FLETCHER, RICHARD A. PAEZ, MARSHA S. BERZON, JAY S. BYBEE and MILAN D. SMITH, JR.) AFFIRMED; REMANDED. Judge: AK Dissenting, Judge: MDS Authoring. FILED AND ENTERED JUDGMENT. [Edited 12/09/2009 by SS - Due to a printing error, Judge W. Fletcher's name was not printed on the opinion. The opinion has been corrected, and the NDA has been re-sent to all case participants.] [7156469] [03-99003, 03-99008] (RP)
12/15/2009	⌐ 106 6 pg, 112.2 3 KB	Filed (ECF) Appellant Robert L. Ayers, Jr. in 03-99003 Motion to stay the mandate. Date of service: 12/15/2009. [7164967] [03-99003, 03-99008] (JWB)
12/15/2009	⌐ 107 3 pg, 246.4 5 KB	Filed (ECF) Appellant Robert L. Ayers, Jr. in 03-99003 Correspondence: Letter re: Counsel Listing in Published Opinion. Date of service: 12/15/2009 [7165523] [03-99008, 03-99003] (JWB)
12/16/2009	⌐	Filed order (MILAN D. SMITH,

	108 1 pg, 22.83 KB	JR.)Respondent's Motion for Stay of Mandate for ninety days from the entry of judgment is GRANTED. [7166943] [03-99003, 03-99008] (PA)
03/15/2010	109 1 pg, 23.63 KB	Received notice from the Supreme Court: petition for certiorari filed on 03/09/2010. Supreme Court Number 09-1088 and placed on the docket on 3/11/10. [7272835] [03-99003, 03-99008] (PA)
06/17/2010	110 1 pg, 27.05 KB	Received Supreme Court order dated 06/14/2010 Granting Writ of Certiorari. [7408395] [03-99003, 03-99008] (PA)

General Docket
United States Court of Appeals
for the Ninth Circuit

Docketed: 04/23/2003
Termed: 12/09/2009

Court of Appeals Docket #: 03-99003
Nature of Suit: 3535 Habeas Corpus: Death Penalty
Pinholster v. Ayers
Appeal From: U.S. District Court for Central California, Los Angeles
Fee Status: Paid

- -

Case Type Information:
1) prisoner-death penalty
2) state
3) death penalty habeas corpus

- -

Originating Court Information:
District: 0973-2 : CV-95-06240-GLT
Court Reporter: Dawn Bullock, Court Reporter
Trial Judge: Gary L. Taylor, District Judge
Date Filed: 09/19/1995
Date Order/Judgment: 03/27/2003
Date NOA Filed: 04/18/2003

- -

Prior Cases:

97-15185
Date Filed: 02/05/1997
Date Disposed: 03/17/1998
Disposition: Affirmed – Memorandum

97-17056
Date Filed: 10/30/1997
Date Disposed: 10/26/1998

Disposition: Affirmed – Memorandum

Current Cases:

Lead	Member	Start	End
Cross-Appeal			
03-99003	03-99008	06/25/2003	

- -

SCOTT LYNN PINHOLSTER (-: Reg.#C-87601)
Petitioner - Appellee,

Sean Kevin Kennedy, Federal Public Defender
Direct: 213-894-5063
[COR LD NTC Assist Fed Pub Def]
FPDCA - FEDERAL PUBLIC DEFENDER'S OFFICE (LOS ANGELES)
321 East Second Street
Los Angeles, CA 90012-4202

v.

JEANNE S. WOODFORD, of the California State Prison at San Quentin
Terminated: 04/07/2008
Respondent – Appellant,

ROBERT L. AYERS, Jr., Warden
Respondent – Appellant,

James William Bilderback, II,
Supervising Deputy Attorney General
[COR LD NTC Dep State Aty Gen]
AGCA - OFFICE OF THE CALIFORNIA ATTORNEY GENERAL (LA)

300 South Spring Street
Los Angeles, CA 90013

Kristofer Jorstad
Direct: 213-897-2275
[COR LD Dep State Aty Gen]
AGCA - OFFICE OF THE
CALIFORNIA ATTORNEY GENERAL
(LA)
Suite 1702
300 South Spring Street
Los Angeles, CA 90013

- -

SCOTT LYNN PINHOLSTER,

Petitioner - Appellee,

v.

ROBERT L. AYERS, Jr., Warden,

Respondent - Appellant.

04/23/2003	⌐ 2	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. setting schedule as follows: appellant's opening brief is due 8/4/03 for Jeanne S. Woodford; appellees' brief is due 9/3/03 for Scott Lynn Pinholster; [03-99003](DP-Staff/Atty) (PA)
04/23/2003	⌐ 5	Received courtesy copy of District Court order filed on 4/22/03

		granting respondent (Jeanne Woodford's) request for stay pending appeal. (casefiles) [03-99003] (PA)
04/24/2003	⌐ 4	Criminal Justice Act voucher sent (Voucher #) to Michael R. Snedeker for Appellee Scott Lynn Pinholster [03-99003] (CB)
04/28/2003	⌐ 6	Filed Appellant Jeanne S. Woodford's emergency motion under Cir. Rule 27-3(b) for stay pending appeal of the district court order granting a new penalty phase trial in a death penalty case; served on 4/25/03. (DP-Staff/Atty) ***(received fax copy on 4/24/03)*** (PA)
05/15/2003	⌐ 8	Filed order (Harry PREGERSON, Stephen R. REINHARDT, Susan P. GRABER): The Warden's unopposed motion for a stya of the district court's judgment pending appeal is granted. (Phoned, Faxed and Served Csls) [03-99003] (PA)
06/03/2003	⌐ 10	Filed certificate of record on appeal RT filed in DC 10/18/02. (Casefiles) [03-99003] (PA)
06/03/2003	⌐	FILED CERTIFIED RECORD

	11	ON APPEAL AS OF 10/18/02 (ORIGINAL), CONTAINING 16 VOLUMES OF ORIGINAL CLERK'S FILE, 5 BOXES OF STATE LODGED DOCUMENTS, 1 VOLUME OF BULKY DOC. (DKT# 118), 3 VOLUMES OF REPORTER'S TRANSCRIPTS. (RECORD) NOTE** TRANSMITTAL FORM INDICATES THAT SEARCH HAS BEEN PLACED REQUESTING FOR DOCS. NOS# 109,112,114. [03-99003] (PA)
06/25/2003	⌐ 12	Filed original and 4 copies Scott Lynn Pinholster's motion for Broader Certificate of Appealability and Memorandum and Points; Srved on 6/23/03. (DP-Staff/ATTY) [03-99003, 03-99008] (PA)
06/26/2003	⌐ 13	Filed order MOATT (ME) The briefing schedule set on 4/23/03 is vacated. Respondent's response to Petitioner's motion for a broader certificate of appealability (COA) is due on 7/30/03. A new briefing schedule will be set at the time the motion for a broader COA is decided. (Faxed and Served Csls) [03-99003, 03-99008] (PA)
07/31/2003	⌐	Filed Appellant Jeanne S.

	15	Woodford's response to Petitioner's Motion for Broader COA entitled "Respondent's Notice of Non-Opposition to Petitioner's Motion for Broader COA; served on 7/28/03. (DP-Staff/Atty) [03-99003, 03-99008] (PA)
08/07/2003	⌜ 16	Criminal Justice Act voucher sent (Voucher #) to Michael R. Snedeker for Appellant Scott Lynn Pinholster in 03-99008 [03-99008] (CB)
09/18/2003	⌜ 27	Filed order (Betty B. FLETCHER, Barry G. SILVERMAN, Kim M. WARDLAW): Petitioner moves for a broader certificate of appealability (COA) to appeal seven additional issues. Respondent does not oppose the motion. Although Respondent contends that the issues are meritless, Respondent does not state that they are so lacking in merit that they are undebatable. Accordingly, Petitioner's unopposed motion for a broader COA, which raises on its face seven debatable constitutional issues, is granted. See Miller-El v. Cockrell, 123 S.Ct. 1029, 1039-40(2003). The briefing schedule is set as follows: Respondent's

opening brief and excerpts of record are due 10/30/03; Petitioner's combined answering and opening brief and his supplemental excerpts of record are due 12/16/03; Respondent's combined reply and answering brief is due 1/20/04; Petitioner's optional reply brief, if any, is due within 14 days from service of Respondent's combined brief. All briefs shall conform to federal and local rules.(Served Csls) [03-99003, 03-99008] (PA)

10/24/2003 ⌐ 18 Filed Respondent Jeanne S. Woodford's motion for an extension of time to file first cross-appeal brief until 12/14/03; served on 10/22/03. (dpc) [03-99003, 03-99008] [03-99003, 03-99008] (PA)

10/28/2003 ⌐ 19 Filed order (Deputy Clerk: pi) The respondent's unopposed motion for a 45-day extension of time within which to file the opening brief on cross-appeal is granted. The respondent-appellant's opening brief and excerpts of record are now due on 12/15/03; the petitioner's combined brief in response to the opening brief and his opening brief on cross appeal is due 01/14/04; and the respondent's

combined reply brief and brief in response to petitioner's opening brief is due 2/13/04. The petitioner's reply brief may be filed within 14 days of respondent's responsive brief. All briefs must conform with Federal Rules of Appellate Procedure and Circuit Rule 32-1 and 32-4. (Served to Csls) [03-99003, 03-99008] (PA)

11/06/2003 20 CJA-30 voucher received and returned to counsel: premature. He prefers to wait & submit interim billing after briefing is complete. Issued another voucher for him to use at that time. (SA)

12/08/2003 21 Filed Respondent-Appellant's second unopposed motion for extension of time to 1/29/04 to file firste cross-appeal brief; served on 12/5/03. (DP-Staff/Atty) [03-99003, 03-99008] [03-99003, 03-99008] (PA)

12/11/2003 23 Filed order MOATT (ME) Respondent's second unopposed motion for a 45-day extension of time to file its opening brief is granted. Respondent's opening brief and excerpts of record are due on 1/29/04. Petitioner's combined opening and responsive brief and his excerpts of record

		are due 3/19/04. Respondent's combined responsive and reply brief is due 4/28/04. Petitioner's optional reply, if any, is due within 14 days from service of Respondent's combined brief. All briefs shall conform to federal and local rules. (Served and Faxed to Csls) [03-99003, 03-99008] (PA)
01/07/2004	⌐ 25	Received Petitioner Scott Lynn Pinholster's PRO SE Motion for Broader Certificate of Appealability; served on 1/5/04. (Petitioner represented by Csl)[DP-Staff/Atty] [03 99003, 03-99008] ****(6/9/05: Pro Se Motion Striken by ORDER of June 9, 2005)**** (PA)
01/30/2004	⌐ 28	Filed original and 15 copies Jeanne S. Woodford's first brief on cross-appeal of 90 pages (20,413 words) and an original and 5 copies of excerpts of record in 5 volumes; served on 1/29/04. (RECORDS) [03-99003, 03-99008] (PA)
02/25/2004	⌐ 29	Received Appellant Scott Lynn Pinholster's Ex Parte Motion for Appointment of Appeal Counsel; served on 2/22/04. (DP-Staff/Atty) [03-99003, 03-99008] ****(6/9/05: Ex Parte Motion Striken by

ORDER of June 9, 2005)**** (PA)

03/16/2004	⌐ 30	Received Appellee Scott Lynn Pinholster's letter dated 3/11/04 re: Requesting a copy of the Court's docket sheet to be sent to him. (Casefiles) [03-99003, 03-99008] (PA)
03/16/2004	⌐ 31	Sent Petitioner Pinholster copy of public docket sheet per request on 3/11/04. [03-99003, 03-99008] (PA)
03/17/2004	⌐ 32	Filed original and copies of Scott Lynn Pinholster's Motion for an extension of time to 5/4/04 to file second cross-appeal brief; served on 3/16/04. (dpc) [03-99003, 03-99008] [03-99003, 03-99008] (PA)
03/19/2004	⌐ 33	Filed order (Deputy Clerk: pi) Petitioner's unopposed motion for extension of time within which to file his combined responsive brief and opening-brief on cross-appeal is GRANTED. The petitioner's responsive brief and opening brief are now due on 5/4/04; respondent's combined reply brief and brief in response to petitioner's opening brief is due 6/3/04; petitioner's reply brief, if any, may be filed within 14 days of respondent's responsive brief. (Phoned, Faxed and Served to

Csls) [03-99003, 03-99008] (PA)

05/04/2004 ⌐ 34 Filed original 5 copies Scott Lynn Pinholster's motion to extend time to 6/29/04 to file combined opening brief and responsive brief or second cross-appeal brief and declaration in support of, served on 5/3/04. (DP/Staff-Atty) [03-99003, 03-99008] (EU)

05/06/2004 ⌐ 35 Filed order MOATT (ME) Petitioner's second unopposed motion for an extension of time, until 6/29/04, to file his combined opening brief and responsive brief is granted. Respondent's combined responsive and reply brief is due 8/24/04, Petitioner's optional reply, if any, is due within fourteen days from service of Respondent's combined brief. (notified csl) [03-99003, 03-99008] (EU)

06/24/2004 ⌐ 36 Filed Petitioner Scott Lynn Pinholster's Third Motion for Extension of Time to 07/28/04 to File Second Cross-Appeal brief; served on 06/23/04. (DP-Staff/Atty) [03-99003, 03-99008] [03-99003, 03-99008] (PA)

06/28/2004 ⌐ 37 Filed order MOATT (ME) Pettioner's third unopposed motion for an extension of time,

		until July 28, 2004, to file his combined and responsive brief is granted. Respondent's combined responseive and reply brief is due September 23, 2004. Petitioner's optional reply, if any, is due within twenty-onde days from service of Respondent's combined brief. (Faxed/Served to Csls) [03-99003, 03-99008] (PA)
07/28/2004	⌐ 38	Filed Petitioner Scott Lynn Pinholster's 4th Motion for Extension of time to 8/4/04 to file second cross-appeal brief; served on 7/27/04. (DP-Staff/Atty) [03-99003, 03-99008] (PA)
07/28/2004	⌐ 41	Filed order MOATT (ME) Petitioner's motion for an additional sevens days, until 08/04/04, to file his combined opening brief and responsive is granted. Respondent's combined responsive and reply brief and its excerpts of record, if any, are due 10/04/04. Petitioner's optional reply, if any, is due within 21 days from service of Respondent's combined brief. (Fax/Served and Phoned Csls) [03-99003, 03-99008] (PA)
08/05/2004	⌐ 42	Filed Petitioner Pinholster's Motion to File Oversized Combined brief; Attached

		Proposed Brief of 24,328 Words; Served on 8/4/04. (DP-Staff/Atty) [03-99003, 03-99008] [03-99003, 03-99008] (PA)
08/05/2004	⌐ 43	Received Petitioner Scott Lynn Pinholster's oversized 2nd cross-appeal brief of 110 pages (24,328 words); served on 08/04/04. (Motion to File Oversize Pending w/DP-St/Atty) [03-99003, 03-99008] (PA)
08/06/2004	⌐ 44	Filed order MOATT (ME) Petitioner's motion to file an oversized combined responsive and opening brief is denied. Petitioner's combined brief, conforming to the size limitations of Ninth Circuit Rule 32-4, is due September 10,2004. Respondent's combined reply and responsive brief is due November 10, 2004. Petitioner's optional reply, if any, is due within 21 dyas from service of Respondent's combined brief. (Phoned/Faxed/Served to Csls) [03-99003, 03-99008] (PA)
08/19/2004	⌐ 46	Received Appellee Scott Lynn Pinholster's dated 8/17/04 re: Request for updated docket sheet and Request Order or Ruling regarding Pro Se Motion for Broader COA. (Casefiles) (Sent updated docketsheet on 8/31/04)

[03-99003, 03-99008] (PA)

09/14/2004 [48] Filed original and 15 copies of Scott Lynn Pinholster's second-cross appeal brief of 90 pages (20,917 words) and excerpts of record in 2 volumes. (Records) [03-99003, 03-99008] (PA)

10/13/2004 [50] Filed atty Michael R. Snedeker ex parte motion for interim CJA pymt (APP COMM w/ CJA voucher) (SA)

10/22/2004 [49] Received Petitioner Pinholter's PRO SE motion to take judicial notice of judicial records; served on 10/20/04 to AG and FPD. (DP-Staff/Atty) [03-99003, 03-99008] (PA)

11/03/2004 [51] Filed original and 5 copies of Respondent's motion for extension of time to 12/9/04 to file third cross-appeal brief; served on 11/2/04. (DP-Staff/Atty) [03-99003, 03-99008] [03-99003, 03-99008] (PA)

11/03/2004 [52] Filed order (Appellate Commissioner) Due to clerical oversight, petitioner's pro se motion for broader certificate of appealability and petitioner's pro se motion for appointment of new counsel, received by the court on

		01/7/04 and 02/22/04 respectively, have not yet been addressed. Although the court does not entertain pro se motion from represented parties, the issues raised in the pro se motions warrant a response from petitioner's counsel. The Clerk shall serve petitioner's counsel with copies of both motions. Within 14 days after the date of this order, petitioner's counsel shall file a response addressing the points raised in the pro se motions. Petitioner's counsel may move to file the response under seal if appropriate. The briefing schedule set forth in the deputy clerk's order of 8/6/04 is suspended. (Served Csls by fax/mail and Petitioner by mail.) [03-99003, 03-99008] (PA)
11/03/2004	⌐ 53	Sent letter to Petitioner Scott Pinholster (deputy:me): Stating the Court declines to entertain Pro Se Motion for Judicial Notice received by this court on 10/20/04, because petitioner is represented by counsel. A copy of Pro Se motion will be sent to petitioner's csls. (Served Petitioner, Ptr's Csls by mail) [03-99003, 03-99008] (PA)
11/03/2004	⌐	Filed order MOATT (ME) In light

	55	of the Appellate Commissioner's 11/3/04 order suspending briefing, Respondent's motion, servd on 11/2/04, for an extension of time to file its combined responsive and reply brief is denied as moot. (Faxed/Mailed it Csls) [03-99003, 03-99008] (PA)
11/24/2004	58	Filed notice of representation of Sean K. Kennedy and Anthony J. Cavalluzzi for Petitioner Scott Lynn Pinholster; Served on 11/22/04. (DP-Staff/Atty, App-Comm., and Casefiles) [03-99008, 03-99003] (PA)
11/24/2004	59	Filed Petitioner Pinholster's Motion for Extension of Time to File Csl's Response to Petitioner's Pro Se Motions. (Response Late); served on 11/22/04. (DP-Staff/Atty, and App.Comm) [03-99008, 03-99003] [03-99008, 03-99003] (PA)
11/30/2004	60	Filed order (Appellate Commissioner) Petitioner's motion for an extension of time to file counsels' response to petitioner's pro se motions is granted. The response is due January 18, 2005. (Phoned/Faxed/Served Csls) [03-99003, 03-99008] (PA)

12/01/2004	⌐ 61	Filed order (Appellate Commissioner) The motion of appellant's appointed counsel, Michael R. Snedeker, Esq., for interim payment under the CJA is granted. The voucher has been certified for the full amount claimed, as audited by the Clerk. Within 45 days after the final disposition of the case in this court or after the filing of a petition for a writ of certiorari, whichever is later, counsel may submit a final voucher seeking payment of any further compensation sought. (Operations) [03-99003, 03-99008] (DL)
01/10/2005	⌐ 62	Filed Anthony J. Cavalluzzi's (Atty for Petitioner) Motion For Extension of time to File Counsel's Response to Petitioner's Pro Se Motions; Served on 1/7/05. (DP-Staff/Atty) (PA)
01/18/2005	⌐ 63	Filed order (Appellate Commissioner) Counsel's second motion for extension of time to file a response to Petitioner's pro se motions is granted. Counsel's response is due 3/21/05. (Faxed/Served to Csl) [03-99003, 03-99008] (PA)
03/22/2005	⌐	Filed Anthony J. Cavalluzzi and

	64	Sean K. Kennedy (Attys for Petitioner) Third Motion for Extension of Time (60 days or May 20, 2005) to File Counsel's Response to Petitioner's Pro Se Motions; Served on 3/21/05. (DP-Staff/Atty) (PA)
03/24/2005	65	Filed order (Appellate Commissioner) Counsel moves for a third extension of time to file a response to Petitioner's pro se motions. Counsel does not anticipate requesting any further extensions. Counsel's motion is granted. The response is due on May 20, 2005. (phoned/faxed/served csl) [03-99003, 03-99008] (PA)
05/23/2005	66	Received Petitioner's Csl's Response to Court's 3/24/05 Order entitled Csl's Response to PRO SE Motion for Broader COA and Pro Se Motion for Appointment; Served on 5/20/05. (Response Late, Mtn Needed; Contacted Csl Mtn to follow) [DP-Staff/Atty] [03-99003, 03-99008] (PA)
05/25/2005	67	Filed Petitioner's Atty's FAXED Motion to Late Response to Court's Order for Csl's Response to Pro Se Motion for Broader COA and Pro Se Mtn for Appointment; Served on 5/25/05.

(DP-Staff/Atty) (Response to Crt's Order Rcvd 5/23/05) [03-99003, 03-99008] [03-99003, 03-99008] (PA)

06/09/2005 ⌜ 68 Filed order (Appellate Commissioner) Counsel's motion to file a late response to the pro se motions is granted. Pursuant to counsel's response, the request to withdraw the February 25,2004 pro se motion for appointment of new counsel is granted. The pro se motion for broader certificate appealability shall be addressed as follows. The court amended its rules, effective January 1, 2004, to eliminate the use of a motion for broader certificate of appealability by requiring that uncertified issues be raised under separate heading in Petitioner's opening brief. See 9th Cir. R. 22-1(e) (See Order for text).....Accordingly, the Clerk shall strike Petitioner's January 7, 2004 pro se motion for a broader certificate of appealability and counsel's September 14, 2004 combined opening and answering brief. Counsel's combined opening and answering replacement brief, raising appropriate uncertified issues in the manner required Ninth Circuit Rule 22-1(e), is due

		on July 12, 2005. Respondent's combined answering and reply brief is due September 12,2005. Petitioner's optional reply brief, if any, is due within 21 days after service of Respondent's combined brief. (Phoned/Faxed/Served Csl) [03-99003, 03-99008] (PA)
07/05/2005	⌐ 70	Filed original and copies of Petitioner's Motion for Extension of Time to 8/27/05 to File Second Cross-Appeal Replacement Brief; Served on 7/1/05. (DP-Staff/Atty) [03-99003, 03-99008] [03-99003, 03-99008] (PA)
07/08/2005	⌐ 71	Filed order MOATT (ME) Petitioner's unopposed motion for an extension of time to file his combined opening and answering replacement brief is granted; that brief is due 8/29/05. Respondent's combined answer and reply brief is due 10/28/05. Petitioner's optional reply, if any, is due within 21 days from service of Respondent's combined brief. (Faxed/Served Csl) [03-99003, 03-99008] (PA)
08/23/2005	⌐ 72	Filed Petitioner Scott Lynn Pinholster's Motion for Extension of Time to 11/28/05 to file Combined Opening and Answering (second cross-appeal)

replacement brief; served on 8/22/05. (DP-Staff/Atty) [03-99003, 03-99008] (PA)

08/25/2005 ☐ 73 Filed order MOATT (ME) Petitioner's unopposed motion for a 90-day extension of time, until 11/28/05, to file his combined opening and answering replacement brief is granted. Respondent's combined answer and reply brief is due 2/3/06. Petitioner's optional reply, if any, is due within 21 days after service of Respondent's combined brief. (Faxed/Served Csl) (PA)

11/28/2005 ☐ 74 Filed "faxed" copy Scott Lynn Pinholster's final unopposed motion for extension of time to file petitioner's combined opening and answering replacement brief until 12/12/05, and declaration in support of, served 11/28/05. (DP-STAFF/ATTY) (orig. copy rec'd on 11/29/05 for casefile)[03-99003, 03-99008] (EU)

11/28/2005 ☐ 75 Filed order MOATT (ME) Petitioner's unopposed mtn for a 14 day extension of time, until 12/12/05, to file his combined opening and answering replacement brief is granted. Respondent's combined answer and reply brief is due 2/17/06.

		Petitioner's optional reply, if any, is due within 21 days after service of respondent's combined brief. (phoned to csl @ 3:45 p.m) [03-99003, 03-99008] (EU)
12/14/2005	77	Filed Original and Copies of Petitioner Pinholster's Second Brief on Cross-Appeal of 91 pages or 23,200 words with 5 copies of 1 volume Supplemental Excerpts of record; Served on 12/12/05. (Records) [03-99003, 03-99008] (PA)
02/13/2006	78	Filed Respondent's motion for extension of time to 04/17/06 to file third cross-appeal brief; served on 2/9/06. (DP-Staff/Atty) [03-99003, 03-99008] (PA)
02/15/2006	79	Filed order MOATT (ME) Respondent's unopposed motion for a 60-day extension of time to file its combined answer and reply brief is granted. Respondent's combined brief is due April 18, 2006. Petitioner's optional reply, if any, is due within 21 days after service of Respondent's combined brief. (Faxed/Served Csl) [03-99003, 03-99008] (PA)
04/10/2006	80	Filed Respondent's Unopposed motion for second extensionof

		time to 6/19/06 to file respondent's combined answer and reply brief; served on 4/7/06. (Served to DP-Staff/Atty) [03-99003, 03-99008] (PA)
04/12/2006	⌐ 81	Filed order MOATT (ME) Respondent's second unopposed motion for an extension of time, until June 20, 2006, to file its combined answer and reply brief is granted. Petitioner's optional reply, if any, is due within 21 days after service of Respondent's combined brief. (Phoned/Faxed to Csl) [03-99003, 03-99008] (PA)
06/13/2006	⌐ 82	Filed Respondent's Motion for Extension of Time to 8/19/06 to file third cross-appeal brief; Served on 6/12/2006. (DP-Staff/Atty) [03-99003, 03-99008] , served on [03-99003, 03-99008] (PA)
06/14/2006	⌐ 83	Filed order MOATT (ME) Respondent's third unopposed motion for an extension of time to file its combined answer and reply brief is granted. Respondent's combined brief is due August 22, 2006. Petitioner's optional reply, if any, is due within 21 days after service of Respondent's combined brief. (Phoned/Faxed/Served Csl) [03-

99003, 03-99008] (PA)

08/23/2006	84	Filed Respondent's cross-appeal motion to file oversized combined reply brief (xap3 brief) of 72 pages (15,522 words); served on 8/22/06. (DP-Staff/Atty) [03-99003, 03-99008] [03-99003, 03-99008] (PA)
08/23/2006	85	Received original and 15 copies of Respondent's 3rd cross-appeal brief of 72 pages (or 15,522 words); served on 8/22/06. (Motion to File Oversize Pending w/DP-Staff-Atty) [03-99003, 03-99008] (PA)
09/12/2006	86	14 day oral extension by phone of time to file Petitioner's reply brief. Reply brief is now due 9/28/06. [03-99003, 03-99008] appellants' reply brief due ; (PA)
09/13/2006	87	Filed order MOATT (ME) Because Respondent's combined brief comprised of 15,522 words is both an answering brief and a reply brief, Respondent's motion for leave to file an oversized combined brief is denied as unnecessary. See 9th Cir.R. 32-4 (permitting 21,000 words for principal briefs in capital cases.) The Clerk shall file Respondent's combined brief, received on

August 23, 2006. (Faxed/Served Csl) [03-99003, 03-99008] (PA)

09/14/2006 ⌐ 89 Filed original and 15 copies of Respondent's third brief on cross-appeal of 71 pages or 15,522 words; Served on 8/22/06. (See Court's 9/13/06 Order)[Cvrsht of Brief has wrong color, Csl sending corrected brief coversht.)[As of 9/18/06 Received and Replaced Cvrsht of Respondent's 3rd cross-appeal brief] [03-99003, 03-99008] (PA)

09/29/2006 ⌐ 90 Filed original and 15 copies of Petitioner's cross-appeal reply brief of 19 pages or 4,774 words; served on 9/28/06. (RECORDS)) of 19 pages; served on 9/28/06 [03-99003, 03-99008] (PA)

09/29/2006 ⌐ 91 Received Petitioner's PRO SE Motion entitled "Pro-Se Application" for Stay of All Proceedings In this Ocurt Pending Resolution of Performance of DNA Testing; Served on 9/26/06. (DP-Staff/Atty) [03-99003, 03-99008] (PA)

10/06/2006 ⌐ 93 Filed order (Appellate Commissioner) On September 29,2006, the court received petitioner's pro se motion to stay appellate proceedings pending

		resolution of petitioner's application in state court for DNA testing. Because petitioner is represented by counsel, only counsel may submit filings, and this court therefore declines to entertain the motion. The Clerk shall serve a copy of the prose motion on appellant's counsel of record for whatever action counsel deems appropriate. Petitioner is reminded that parties represented by counsel ordinarily must communicate with the court through counsel. (Served Csl and Petitioner) [03-99003, 03-99008] (PA)
10/17/2006	⌐ 94	Filed Petitioner's Motion to Take Judicial Notice; Served on 10/13/06. (DP-Staff/Aty) [03-99003, 03-99008] [03-99003, 03-99008] (PA)
11/13/2006	⌐ 95	Filed order MOATT (ME) Petitioner's 10/17/06 Request for judicial notice is referred to the merits panel for such consideration as it deems appropriate. (Faxed/Served Csl) [03-99003, 03-99008] (PA)
11/28/2006	⌐ 98	Calendar check performed [03-99003, 03-99008] (AW)
12/06/2006	⌐	CALENDARED: Univ of WASH

	99	School of Law Apr 11 2007 10:00 am Magnuson/Jackson Moot Ctrm [03-99003, 03-99008] (AW)
04/02/2007	101	Filed fax copy of Scott Lynn Pinholster's additional citations, served on 4/2/07. (Original and Copies to follow by mail)[Faxed/Served to Panel] [03-99003, 03-99008] (PA)
04/11/2007	102	ARGUED AND SUBMITTED TO Alex KOZINSKI, Raymond C. FISHER, Richard C. TALLMAN [03-99003, 03-99008] (KM)
05/02/2008	105 79 pg, 366 8 8 KB	FILED OPINION (ALEX KOZINSKI, RAYMOND C. FISHER and RICHARD C. TALLMAN) AFFIRMED IN PART; REVERSED IN PART; VACATED; REMANDED. [Affirmed in Part and Reversed/Vacated in Part;Terminated on the merits after oral hearing;Written, reasoned, signed, published; Judge: AK Concurring, Judge: RCF Dissenting, Judge: RCT Authoring (Panel involvement data updated for cases: 03-99003)]. FILED AND ENTERED JUDGMENT. [03-99003, 03-99008] (RP)
05/08/2008		Filed Appellant Scott Lynn

	106	Pinholster's motion for extension of time to 6/30/08 to file petition for rehearing and rehearing en banc; served on 5/7/08. [03 99003, 03-99008] (PA)
05/12/2008	107 1 pg, 22.34 KB	Filed order (RICHARD C. TALLMAN) The motion for an extension of time of 45 days to June 30, 2008, to file a petition for rehearing en banc is granted. (PA)
06/24/2008	108	Filed Appellant 'a motion to extend time to file petition for rehearing until 07/15/2008. Served on 06/23/2008. [03-99003, 03-99008] (Panel) (PA)
06/30/2008	109 1 pg, 24.15 KB	Filed order (RICHARD C. TALLMAN) Granting Appellant's Motion to extend time to file petition for rehearing. Petition for rehearing en banc shall be filed with the Clerk of Court no later than 7/15/08. No further extensions will be granted. [03-99003, 03-99008] (PA)
07/15/2008	110	Filed original and 50 copies of Petitioner Pinholster's s petition for panel rehearing and petition for rehearing en banc Number of Pages 19. (or 4,122 words); Served on 07/12/2008. Date circulated to the court: 07/15/2008

(PANEL-ACTIVE JUDGES-ANY INTERESTED SENIOR JUDGES) [03-99003, 03-99008] (PA)

07/21/2008 ⌐ 111 1 pg, 23.38 KB — Filed order (RICHARD C. TALLMAN) The Respondent shall file a response to the petition for rehearing and suggestion for rehearing en banc not exceeding fifteen (15) pages in length setting forth its position on whether this case should be reheard en banc. Fifty (50) copies of the brief shall be filed within thirty (30) days from the date of this order. (PA)

08/19/2008 ⌐ 112 — Filed original and 50 copies of Respondent's response to Petition for panel and en banc rehearing of 15 pages or 3382 words; served pm 8/18/08. Date circulated to the court:08/20/2008 (PANEL-ACTIVE JUDGES ANY INTERESTED SENIOR JUDGES) PLEASE NOTE: THE ATTACHED DOCUMENT IS A DOCUMENT INTERNAL TO THE COURT AND IS NOT ACCESSIBLE ON PACER OR ECF. [03-99003, 03-99008]-- [Edited 08/19/2008 by PA]-- (PA)

03/20/2009 ⌐ 113 — Filed Order for PUBLICATION (ALEX KOZINSKI) Upon the vote

		1 pg, 28.5 KB	of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit. [03-99003, 03-99008] (RP)
03/20/2009	☐	114 4 pg, 23.8 KB	Filed (ECF) notice of appearance of JAMES WILLIAM BILDERBACK II for Appellant Robert L. Ayers, Jr.. Date of service: 03/20/2009. [6853975] (JWB)
03/25/2009	☐	115	Added attorney James William Bilderback II for Robert L. Ayers Jr., in case 03 99003 James William Bilderback II for Jeanne S. Woodford, in case 03-99008. [03 99003, 03-99008] (PA)
03/25/2009	☐	116 2 pg, 30.43 KB	Filed order (ALEX KOZINSKI) [03-99003, 03-99008]En banc oral argument will take place during the week of June 22, 2009, in Seattle, Washington. The date and time will be determined by separate order. Within seven days from the date of this order, the parties shall forward to the Clerk of Court thirty additional copies of the original briefs and excerpts of record. (PA)

03/26/2009	117	CALENDARED: week of 06/22/2009 --exact date & time to be determined via further order; Seattle, WA, Nakamura Cthse, 8th Floor [03-99003, 03-99008] (AM)
03/30/2009	118	Received Petitioner's 30 copies of orginal brief and EOR per Court's Order of 3/25/09. [03-99003, 03-99008] (PA)
05/29/2009	122 1 pg, 9.68 KB	Filed order (ALEX KOZINSKI) Oral argument in this en banc case will be held at 10:00 a.m. on Tuesday, June 23, 2009, in the 8th Floor Courtroom at the William K. Nakamura U.S. Courthouse, located at 1010 Fifth Avenue, Seattle, Washington 98104. http://www.ca9.uscourts.gov/information/locations.php [03-99003, 03-99008] (AW)
05/29/2009	120	UPDATED CASE CALENDARED: 06/23/2009 10:00 AM Seattle, WA SE Nakamura Cthse 8th Floor Courtroom [03-99003, 03-99008] (AW)
05/29/2009	121 6 pg, 51.58	Notice of en banc Oral Argument on JUNE 23 2009 Seattle Calendar. Please return ACKNOWLEDGEMENT OF HEARING NOTICE form to:

	KB	SEATTLE Office. Attention: Please open attached documents to view details about your case. [03-99003, 03-99008] (AW)
06/09/2009	123 1 pg, 24.31 KB	Filed clerk order (Deputy Clerk:PA):Courtroom View Network applied to videotape in digital format for later broadcast, the case captioned above, scheduled to be heard at Nakamura Courthouse, Seattle, WA, on Tuesday, June 23, 2009. The majority of Judges on the En Banc Court have voted to grant the application. Courtroom View Network's request to videotape in digital format for later broadcast is GRANTED. (PANEL) [03-99003, 03-99008] (PA)
06/11/2009	124 3 pg, 45.69 KB	Filed (ECF) Appellant Robert L. Ayers, Jr. in 03-99003 citation of supplemental authorities. Date of service: 06/11/2009. [6952999] [03-99003, 03-99008] (JWB)
06/23/2009	125	ARGUED AND SUBMITTED TO ALEX KOZINSKI, HARRY PREGERSON, STEPHEN R. REINHARDT, PAMELA ANN RYMER, ANDREW J. KLEINFELD, KIM MCLANE WARDLAW, WILLIAM A. FLETCHER, RICHARD A. PAEZ, MARSHA S. BERZON, JAY S.

BYBEE and MILAN D. SMITH, JR. [6966357] [03-99003, 03-99008] (SB)

06/25/2009 — 126 — 3 pg, 99.24 KB — Filed (ECF) Appellee Scott Lynn Pinholster in 03-99003, Appellant Scott Lynn Pinholster in 03-99008 citation of supplemental authorities. Date of service: 06/25/2009. [6969871] [03-99003, 03-99008] (SKK)

11/18/2009 — 127 — 3 pg, 253.6 KB — Filed (ECF) Appellant Robert L. Ayers, Jr. in 03-99003, Appellee Jeanne S. Woodford in 03-99008 citation of supplemental authorities. Date of service: 11/18/2009. [7134336] [03-99003, 03-99008] (JWB)

12/09/2009 — 128 — 137 pg, 913.4 3 KB — UPDATED ENTRY - FILED EN BANC OPINION (ALEX KOZINSKI, HARRY PREGERSON, STEPHEN R. REINHARDT, PAMELA ANN RYMER, ANDREW J. KLEINFELD, KIM MCLANE WARDLAW, WILLIAM A. FLETCHER, RICHARD A. PAEZ, MARSHA S. BERZON, JAY S. BYBEE and MILAN D. SMITH, JR.) AFFIRMED; REMANDED. Judge: AK Dissenting, Judge: MDS Authoring. FILED AND ENTERED JUDGMENT. [Edited 12/09/2009 by SS - Due to a

		printing error, Judge W. Fletcher's name was not printed on the opinion. The opinion has been corrected, and the NDA has been re-sent to all case participants.] [7156469] [03-99003, 03-99008] (RP)
12/15/2009	129 6 pg, 112.2 3 KB	Filed (ECF) Appellant Robert L. Ayers, Jr. in 03-99003 Motion to stay the mandate. Date of service: 12/15/2009. [7164967] [03-99003, 03-99008] (JWB)
12/15/2009	130 3 pg, 246.4 5 KB	Filed (ECF) Appellant Robert L. Ayers, Jr. in 03-99003 Correspondence: Letter re: Counsel Listing in Published Opinion. Date of service: 12/15/2009 [7165523] [03-99008, 03-99003] (JWB)
12/16/2009	131 1 pg, 22.83 KB	Filed order (MILAN D. SMITH, JR.)Respondent's Motion for Stay of Mandate for ninety days from the entry of judgment is GRANTED. [7166943] [03-99003, 03-99008] (PA)
03/15/2010	132 1 pg, 23.63 KB	Received notice from the Supreme Court: petition for certiorari filed on 03/09/2010. Supreme Court Number 09-1088 and placed on the docket on 3/11/10. [7272835] [03-99003, 03-99008] (PA)

DIPLOMATE, AMERICAN BOARD OF PSYCHIATRY AND NEUROLOGY

DIPLOMATE, AMERICAN BOARD OF FORENSIC PSYCHIATRY

JOHN M. STALBERG, M.D., INC.
Psychiatry
2901 Wilshire Boulevard, Suite 431
Santa Monica, California 90403

Telephone (213) 828-0800

March 14, 1984

Wilbur G. Dettmar, Esq.
15915 Ventura Blvd., #301
Encino, CA 91436

Re: Scott Pinholster
Case No. A 800733

Dear Mr. Dettmar:

Pursuant to Judge Dan Kaufmann's court order under 987.9 PC, I examined the above defendant on 3-11-84 at County Jail. Material reviewed included police report of this case, and Probation report from 1978.

The defendant is charged with robbery and 2 counts of murder.

The issues are past mental state as well as mitigation, if the special circumstances are found to be true.

OPINIONS

1. When examined, Mr. Pinholster did not manifest any significant signs or symptoms of mental disorder or defect other than his antisocial personality disorder by history. Although he allegedly has epilepsy, he has not been taking medication for the past year at County Jail and has not had a seizure. Additionally, it does not appear he suffers brain damage as he was cognitively intact on mental status examination.

   He has a history of hyperactivity as a youngster and hospitalization at Camarillo State Hospital at the age of 14 for incorrigibility. He was not medicated there and just received 90 day observation. He spent time in the Youth Authority and in various state prisons without requiring psychiatric treatment or medication.

   He has a lengthy history of drug dependency of the narcotic variety, but his drug dependency has not resulted in any brain damage.

2. As for the alleged offenses, the defendant denies any involvement other than directing an individual to burglarize the residence with Mr. Pinholster collecting 1/3 of the money from sale of the stolen loot. He is able to describe his actions on the night in question in great detail, omitting of course any direct involvement with the victims. It would not appear therefore he was significantly

intoxicated or impaired on the night in question.

Additionally, considering the statements attributed to the defendant by witnesses, it would also appear he was fully aware of what he was doing at the time of the offeases. He allegedly stated, "I'll take care of finding out where the dope is. I'll handle Kumar." This was some days before the offenses occurred.

On the night of the offense Mr. Pinholster apparently planned his robbery and was aware of what he was doing. This is by inference as he did not provide any subjective information other than his directing an individual to burglarize Kumar's home.

3. As for mitigation, it does not appear Mr. Pinholster's epilepsy, hyperactivity as a child, or incorrigibility were related to the offenses except the incorrigibility reflects upon his psychopathic personality traits. He was not under the influence of extreme mental or emotional disturbance, nor did he have impaired ability to appreciate the criminality or conform his conduct to the requirements of the law.

Also, because of Mr. Pinholster's personality disorder it is likely he would be recalcitrant and a security problem while in custody.

Sincerely,

[Signature]
JOHN M. STALBERG, M.D.
Diplomate, American Board of Psychiatry and Neurology
Diplomate, American Board of Forensic Psychiatry

JMS/vs

Sheryl Duvall, M.S.
2555 Huntington Drive, A-170
San Marino, CA 91108
(818) 286-8124

Criminal
Justice
Consultant

RECEIVED
Jul 22 1991

DATE: July 17, 1991
TO: Leonard Tauman
RE: Scott Pinholster
SUBJ: San Quentin Interview
July 16, 1991

I saw Scott at San Quentin yesterday. Although I had been assured by Andrea, the person who schedules interviews, that I would get a booth we ended up having to talk over the phone. She apparently didn't follow through on the arrangement and the booth was given to someone else. The interview went all right, though, in spite of the inconvenience.

Scott was very cooperative although he told me he isn't enthused about attempting to get a reversal on penalty alone. In that same vein, he also told me he had instructed his trial attorney not to put on a penalty defense.

I obtained as complete a history as I could from Scott, adding to what I have already learned from his mother.

Scott was born January 25, 1959 in Encino, a suburb of Los Angeles. He has no recollection at all of his

father. His mother rarely spoke of Mr. Pinholster. The only thing Scott remembers her telling him is how much he looked and acted like his father. I asked him if this was done by way of criticism but he said he didn't get that impression – "it was more like an observation."

I have described Scott's siblings in my report regarding his mother and won't repeat that here. He told me he got along well with his brothers and half-sister. He also told me some anecdotes about each which shed some light on Scott's own character:

Alvin

As you know, Alvin died when Scott was around 21 years old. Before that he and Scott had been very close. They were a lot alike and used to get into trouble together. Once they were placed in boys home together but ran away almost immediately.

I asked Scott what he knows of Alvin's psychiatric hospitalization after being found incompetent to stand trial, Scott told me, in his opinion, Alvin had feigned mental illness in order to avoid spending a long time in prison. He said Alvin had read a lot about psychology and "knew what they were looking for." Scott said he never had the impression his brother suffered from mental illness.

Alvin's death had a severe impact on Scott. This will be discussed in more detail below. I think the impact Scott felt had, much later, an indirect effect on Scott's later committing murder.

Terry

Terry hung out with Scott and Alvin until he had a bike accident when he was 16 years old. He was blinded in one eye and had other injuries as well. It took him nearly a year to recover. After his accident Terry "settled down, got more quiet."

Terry had his share of problems, though. When Scott got out of prison (Terry was around 20) he learned that Terry was using a lot of PCP. According to Scott, Terry was "strung out" all the time.

Scott was so upset by this he decided to take action. . . "I put a gun in his mouth and told him I'd shoot him if he didn't stop. I'd rather see him dead than strung out like that." According to Scott, Terry never used PCP again and, in recent years, has thanked him for taking this action.

Terry is now married and, according to their mother, has a successful business in Hawaii.

Tammy

Tammy is about seven years younger than Scott. Because of the age difference, they haven't been as close as the brothers were. Tammy has had a serious drinking problem of which Scott appears to have been only dimly aware. He said he thinks it started after he was pretty much out of the home.

I next asked Scott about his relationships with others in the family. The most significant relationships appear to have been with his mother, step-father and maternal grandfather.

Bernice - Mother

Scott told me he has always felt very close to his mother for whom he has nothing but praise. "She's always been supportive of all the kids. She's always the first there and last to leave. She always had a hot dinner on the table." Further Scott said to his knowledge his mother has never abused drugs or alcohol. She always treated her children kindly, was never abusive.

Scott continues to stay in close contact with his mother. She visits him nearly every month at San Quentin. Scott told me he was upset by his mother testifying at his trial. He thought it was unnecessarily hard on her. I told him, in my experience, loved ones who testify at penalty are almost always glad they did and are better able to cope with the ultimate penalty. Testifying allows them to believe they did everything they could to help and relieves them of possible guilt should the sentence be death. Scott listened to this very intently and seemed reassured by it.

Bud Brashear - Stepfather

Bernice has told me Mr. Brashear abused her boys, particularly Scott, as they were growing up. Scott doesn't concur. He said while his stepfather was hard on them, in his opinion he and his brothers benefitted from Mr. Brashear's discipline - "it toughened us up." He had a home made paddle which he used freely on the boys. According to Scott, this worked to their benefit as they lived in tough neighborhoods so they needed to get used to rough treatment.

The only real complaint he has about his step-father is the fact that he didn't seem to want the kids around. He had very little to do with them, regarding childrearing as his wife's job. This attitude extended even to Tammy who is his own child.

Bud never talked to the kids. He never gave them any encouragement or praise. About the only communication he had with them was by way of reprimand or punishment. Scott remembers one time, for example, that the police came to the house to arrest Scott. Bud wouldn't even talk to them . . . "he was there and it was like he didn't want no part of me, like he didn't even want me there."

Bud was an alcoholic. He would come home drunk and fight with Bernice. Sometimes they got into physical battles. Scott remembers his mother using a broom on Bud, for example. The worst fighting seemed to take place over a two year period when Scott was about eight or nine years old.

Eddie Baumback - Maternal Grandfather

Mr. Baumback is referred to in the Camarillo State Hospital records. It is noted there that his death was thought to have a profound impact on Scott. Scott concurs with this assessment.

Mr. Baumback was a native of Germany. He brought his family to this country when the war ended. During the war, he ran a prison camp for Allied prisoners of war. He never talked about these experiences, though. He always spoke English to his grandchildren. He told them they were Americans and discouraged them from identifying with the

German culture.

When Scott was small Mr. and Mrs. Baumback had a chicken farm in Sunland. Scott used to spend his summers there. He and his grandfather were very close. Mr. Baumback was affectionate with the boys. He made them work hard on the farm but he was quick to praise their efforts. It seems that he made them feel good about themselves.

Mr. Baumback died at age 59 after a short bout with cancer when Scott was eleven years old. Scott was admitted to Camarillo State Hospital shortly thereafter.

I asked Scott if he believes his life would have been different had his grandfather lived. He told me it definitely would have. For one thing, he would have been sent to live with his grandparents as soon as he was arrested the first time. Had that occurred, I think his love for his grandfather and respect for his rules would probably have kept him out of serious trouble.

Childhood Social Environment

As I indicated above, Scott's family lived in rough neighborhoods during his developmental years. They lived in housing projects in North Hollywood and Pacoima. At some point they lived in a house in Arleta where the neighborhood was somewhat more benign.

According to Scott, you had to be very tough to live in the projects. In Pacoima, most of the residents were black. In North Hollywood there were more

Mexicans. Scott and his brothers banded together with the few other white kids in the area. They learned to defend themselves, developing an "us against them" mentality which seems to have carried over even till today.

Scott said he got along better with the Mexican kids than with the blacks. Eventually, when he was 15, he joined a largely Mexican gang and continued to identify with them throughout his adolescence.

Scott's family now lives in an attractive tract in the San Fernando Valley. The neighborhood appears to be quiet. According to Scott, they didn't move there until he was in his late teens.

Scott attributes a lot of his problems with the law to his social environment when he was young. The other kids were getting into trouble, so he naturally went along. He told me he thinks if he had grown up in a place like Beverly Hills, his life probably would have turned out much differently.

School\Learning Disabilities and Hyperactivity

As we know, Scott had serious behavioral and learning problems in school. These seem to have stemmed from a combination of severe learning disabilities that went undiagnosed through his early childhood and accompanying hyperactivity with poor impulse control.

Scott told me he has never seen letters right. He has trouble even copying words so the letters are in the right order. Because of this problem he couldn't seem to learn to read. Eventually his mother took him to a

child guidance clinic where they tested him and diagnosed dyslexia. I think he must have been around nine or ten by then.

I asked Scott to try to recall how it felt to be in school then. He said he started out each day feeling all right. There were some things he was able to learn quickly. Other things, though he just couldn't get at all. By the afternoon, his patience would be exhausted. The teacher went on and on with things Scott believed he was unable to master. Finally, he'd get exasperated and throw all his papers on the table.

Scott told me he also has had extreme difficulty controlling his temper. Big things, he says, don't bother him nearly so much as small things. He told me, "even if someone said something smart to me, I'd lose all control." He still has this problem. He says he just "goes off" and has no ability to control himself once he's provoked. From Bernice's description, it sounds like his real father had the same problem.

Scot's problems with impulse control and apparent hyperactivity continued unabated into his adult life. See the "drug abuse" portion of this report for more on this topic.

Juvenile Placements

Scott was in so many different places he has trouble remembering them all. He also has trouble remembering the sequence of placements. The following is what he was able to come up with during our interview:

Scott believes his first arrest occurred when he was around 12 years old. At least, it was the first to lead to a placement. He thinks he spent around 60 days in juvenile hall before being sent to Camarillo. (According to the Camarillo records, he was actually 11 when he was treated there.)

The time at Camarillo was a good experience for Scott. The staff treated him well and gave him a lot of one-on-one attention. In particular, a counselor named Greg took an interest in him. Greg later had a boys home where Scott spent around six months. According to Scott, he did very well in that program also and was eventually released to go home.

Scott told me the staff told him he didn't need to be in a mental hospital. The reports seem to confirm this. He just needed attention and structure, both of which were in plentiful supply at the hospital.

Scott isn't sure when he was sent to Greg's boy's home. While there he attended a public school in Newhall with no significant problems. I think they're in a different district than Los Angeles so I'll try to get their records.

Shortly after he was discharged from Camarillo, Scott was placed in the Good Samaritan boys home. He said he also got along there, although he had problems in the local school. He was eventually transferred to a continuation school and from then on he did fine. He told me he got along better with the kids in the continuation school. He thinks he spent nearly two years in this institution. Again, I'll try to get their records.

Scott returned home for a few months after leaving Good Samaritan. Then he was placed in the Probation Camp Scott where he did very poorly. He was next transferred to the higher security Camp Kilpatrick where he stayed for nine months. A short while later he was returned and stayed for another six or seven months.

Scott recalls a counselor, John Davidson, with whom he had a good rapport at the camp. According to Scott, Mr. Davidson is now an administrator for the probation department. If this is so he shouldn't be too hard to locate.

It appears that Scott did all right in placement, especially in the relatively benign environments at the hospital and the boys homes.

I asked him if he has any insight into why that might have been. He opined that the "high level of supervision" had a lot to do with it. I suspect another, possibly more important factor, was the attention and approval he got from the staff - something he seems to have been starved for at home.

After his last stint at Camp Kilpatrick, Scott spent a few months at home before being sent to the Youth Authority on a stolen car charge. He thinks he was sent there by a vengeful judge after Scott and a bailiff got into an altercation in the courtroom.

I asked Scott what led to his seeming outburst in court (referred to in the 4/27/78 probation report). He said he and the bailiff had been scuffling in the hallway before he was brought into the courtroom.

Somehow Scott appears to have been "set off" by the bailiff who then filed assault charges. Scott seems to feel this was a bum rap.

Scott spent five or six months at camp Karl Holton. He was released when he was 18. I think I told you earlier these records are no longer available. The Youth Authority destroys its files seven years after the ward is discharged.

Scott remained free for a few months until he was again arrested and sent to prison. He was released in February, 1980 and remained free for nearly two years before his January, 1982 arrest in the present case.

Drug Abuse

Scott told me he started using marijuana when he was around 12 or 13 years old. He graduated to Seconal ("Reds") when he was 16 and to heroin at age 17. He tried cocaine but didn't like it, "it made my heart race."

Heroin is the drug Scott prefers. It slows him down. He told me he "can function normally on it." He developed a pattern of using heroin daily Tuesday through Sunday afternoon. Then he'd stop until after he saw his probation officer on Tuesday after which he would immediately shoot up.

Scott told me the same story his mother had about the heart attack. He said the doctor told him the problem was caused by an additive in the heroin that lodged in his coronary vessels. They gave him something to "clean them out" and then he was fine.

He said thereafter, he tried to use a better grade of heroin. He has had no more problems with his heart.

From his description, it sounds to me like Scott used heroin to medicate himself. He was and apparently continues to have characteristics of hyperactivity. Heroin seems to have fairly effectively slowed him to a more normal level of functioning.

In my July 8 report regarding Scott's mother I mentioned Dr. James Swanson, an expert on hyperactivity and later adult criminality. Dr. Swanson has told me in the past this condition persists into adulthood and continues to affect adjustment throughout the victim's life. It seems to me this has certainly been a factor in Scott's problems with drugs and with the law.

Marriage

Scott has only been married once - to Cathy Ann Smith who he met in a nightclub in 1980. Cathy lived in an apartment but didn't have a job. Scott said he "didn't ask" where she got her money. He doesn't think she was a prostitute but believes she "hustled for money, the same way I did."

Cathy married Scott after his arrest in order to protect herself from the necessity of testifying for the prosecution. They wanted her to talk about Scott's abuse of her. She ended up testifying anyway because the prosecutor told her he would arrest her on old warrants if she didn't. Scott said her testimony didn't hurt, though. When asked about abuse, she said the only time he hit her was when he was having a seizure and didn't know what he was

doing.

Scott hasn't seen or heard from Cathy in several years. She divorced him right after his conviction in this case. I don't have the impression his relationship with Cathy was particularly significant. The relationships which he seems to have held most dear were all with males as will be described below.

Scott told me in confidence (he doesn't want his mother to know) that he has a daughter from a woman with whom he had a casual relationship. She and her husband reunited before the baby was born. Scott saw the child once and was struck by how much she resembled himself. He hasn't seen her since she was an infant.

Epilepsy

As you are undoubtedly aware, Scott has had a number of grand mal seizures since he entered adulthood. He attributes them to a beating he received in the county jail. I wonder, though, if the heart attack he sustained might not have been responsible. Heart attacks sometimes result in cerebral anoxia which in turn can cause seizures.

Scott also told me he never had a seizure when he was on heroin. He has been largely seizure free in the past few years except for what he refers to as "partial seizures" wherein just a portion of his body is affected. He no longer takes medication to control seizures.

Experiences in Texas, Oklahoma and Arkansas

When Scott was released from the Youth Authority he jumped a train and made his way to Texas where his girlfriend's family had moved. He stayed with her brother for a few months, traveling between the three states. For the most part he lived in a little town near Texarkana.

Ultimately Scott and his friend were arrested for robbing a gas station. They were held in jail for 90 days before the charges were dropped. He said he was severely beaten by the police when he was arrested. After his release "all the cops in town knew me." Based on this perceived pressure from the police he eventually decided to return to California.

It's interesting to me that Texas seems to have been a magnet for several people in the family. Recall his father's last known address was in San Antonio. Also, Alvin died in Corpus Christi, Texas. Scott said there was no connection between his and Alvin's trips to Texas and he wasn't aware that his father had moved there.

As far as I can tell, this excursion of Scott's was his only trip away from California.

Significant Relationships

Scott was closest to his grandfather and brother, both of who died as described above. In the week after his brother died, Scott told me he overdosed on heroin three different times. He was just devastated.

Eventually, though, he pulled himself together and went on to form a close bond with a man named William Mintzner who he had met in prison. They were released around the same time and remained in close contact. Scott said they became very close friends. In fact, when I asked him who his most important relationships, after his brother and grandfather, were with Scott never mentioned his wife at all. The only one he mentioned was William.

William was killed in an auto accident in Washington on January 1, 1982. His funeral was a few days later. Scott told me he was again devastated by this new loss. He spent the week after William's death medicating himself with Thunderbird wine and heroin which he was using nearly constantly.

Losing William seemed almost too much to bear. It should be noted that Scott appeared to be fighting tears during this part of our conversation. He said he was almost overwhelmed with grief at the time of the death. His most pronounced emotion at the time was anger, not an uncommon reaction to the death of a loved one.

It was in this emotional state that Scott committed the murders. He doesn't think they would ever had happened had his friend not died. This is not something that came up during his trial and his lawyer didn't ask him about it.

It was a party\wake for Mr. Mintzner that events began that led to the murders. It was only in this context that his death came up in Scott's conversations with his lawyers before the trial.

In closing, Scott asked me to mention to you something about new information regarding Corona's confession. He said it had been presented at trial as a spontaneous act. Just before the trial concluded, Scott learned from Corona's wife that her mother, Connie Paghboun, had reported Corona's involvement to the police. It was this report that led to the police questioning him. Scott believes this is important, because it undermines Corona's credibility and potentially gave him a motive to lie on the stand.

As we have discussed, I continue to believe it's very important that Scott be given a neuropsychological evaluation. I can give you a referral if you need one. If and when you arrange to have that done, note you will need a court order to allow the psychologist to use one of the plexiglass booths. There is no way that kind of evaluation can be done with glass separating the examiner from the client.

There is much to be done on this case. I'll keep sending reports as I contact various witnesses.

[Signature]
Sheryl Duvall, M.S.

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SCOTT LYNN PINHOLSTER, Petitioner, v. ARTHUR CALDERON, Warden of San Quentin State Prison, Respondent.	CASE NO. CV 95-6240 GLT DEATH PENALTY CASE

PETITION FOR WRIT OF HABEAS CORPUS

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Ineffective assistance of a psychiatric expert

Petitioner was deprived of his right under Ake v. Oklahoma 470 U.S. 68 (1985) to the competent assistance of an appropriate psychiatric expert at both guilt and penalty phases due to his expert's failure to recognize, adequately investigate or consider significant mental health impairments of petitioner bearing upon his guilt of the crimes charged and upon issues of mitigation. 54

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CLAIMS FOR RELIEF

I.

Innocence -- unprepared and unpresented defenses

A. Trial counsel failed to recognize, adequately investigate, prepare and present the substantial evidence that petitioner did not premeditate or deliberate the homicides of Thomas Johnson and Robert Beckett, that petitioner did not have the specific intent to kill and that petitioner was suffering from bipolar mood disorder as well as automatism symptomatic of seizure disorder at the time of the homicides. These errors and failures violated petitioner's rights under state decisional and statutory law and his constitutional rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, in that petitioner was denied his right to effective assistance of counsel, his right to due process and a fair trial, his privilege against self-incrimination, his right to confrontation, his right to present a defense, his right to freedom from cruel and/or unusual punishment and his right to a reliable guilt and penalty determination in a capital case. The constitutional violation had a substantial and injurious effect on the verdict, and rendered the trial fundamentally unfair.

B. The facts that support this claim, among others to be developed after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigators and experts, and a hearing, are as follows:

1. Petitioner hereby incorporates all facts and claims of constitutional violations alleged elsewhere in this petition as though fully set forth herein.

2. Trial counsel unreasonably and incompetently failed to recognize, adequately investigate, prepare and present evidence that before, after and at the time of the charged offenses petitioner suffered from serious neurological, psychological and psychiatric disorders and psychotic ideation. Trial counsel unreasonably and incompetently failed to recognize, adequately investigate, prepare and present evidence that, because of petitioner's mental disorders and psychotic ideation at the time of the offenses, petitioner did not and could not premeditate and deliberate the homicides and did not and could not harbor the intent to kill. Further, trial counsel unreasonably and incompetently failed to recognize, adequately investigate, prepare and present evidence that at the time of the offenses petitioner's mental functioning was significantly impaired secondary to neurological and mood disorders at the time of the homicides.

a. Trial counsel unreasonably and incompetently failed to look for or secure readily available school, physician, hospital, jail, Youth Authority, child guidance and other records and documents relating to petitioner's extensive medical, psychological and psychiatric history or to provide said records to mental health professionals.

b. Trial counsel unreasonably and incompetently failed to interview petitioner's family

members, medical providers, teachers, counselors and/or other sources to investigate, identify and prepare mental health issues or to provide said records to mental health professionals.

c. Trial counsel unreasonably and incompetently failed to look for, learn of or secure relevant and readily available social, psychological and psychiatric information concerning petitioner's family history or to provide said records to mental health professionals.

d. Trial counsel unreasonably and incompetently failed to consider or investigate the significance of petitioner's bizarre behavior on the night of the offenses as described in police reports regarding Lisa Tapar and testimony, or to provide said records to mental health professional. [CT 112-119; 129-130; RT 4666-4672; 4692-4695; 4705-4710; 4722-4723.]

e. Trial counsel unreasonably and incompetently failed to consider, investigate, prepare or present evidence of petitioner's seizure disorder. Trial counsel made several abortive and incompetent efforts to introduce this evidence to the jury through lay witnesses. [RT 5596 (Detective Coffey); RT 6015-6018 (Terry Pinholster); RT 6208-6209 (petitioner himself); RT 7314-7316 (Officer Kaufman); RT 7380-7383 (Cathy Smith); and RT 7397-7400 (Mrs. Brashear).] Because counsel had unreasonably failed to secure available records confirming the existence of petitioner's seizure disorder, and unreasonably failed to investigate and research the relevance and import of this substantial disability, the court excluded this evidence during guilt phase (RT 6208-

6209], and the prosecutor ridiculed counsel's efforts to present it during penalty phase. [RT 7443-7446.]

f. Trial counsel unreasonably and incompetently failed to conduct any investigation into mental health issues prior to trial.

g. On March 12, 1984, nine weeks after commencement of trial, trial counsel made a belated, hasty, incompetent and ineffectual effort to secure a mental health evaluation of petitioner. Trial counsel unreasonably and incompetently failed to provide the mental health expert with records and other information necessary for a competent evaluation; unreasonably and incompetently failed to correct false information relied upon by the mental health expert; and unreasonably and incompetently failed to recognize the inadequacy of the evaluation provided by the mental health expert. Petitioner incorporates claim II as though fully set forth herein.

h. Trial counsel's hastily arranged examination of petitioner by Dr. John Stalberg was not a good faith effort to obtain an expert opinion of Mr. Pinholster's psychiatric history and condition. Mr. Dettmar had done no interviewing of anyone in petitioner's family and no research of his own on the nature of epilepsy or seizure disorder or any other mental disease or defect possibly applicable to petitioner. He did not provide Dr. Stalberg with relevant materials regarding either petitioner's past social and medical history or his bizarre behavior at Lisa Tapar's house on the night of the offense, thereby leading Dr. Stalberg to believe that no such materials existed, and further leading Dr. Stalberg to conclude that no defenses or mitigating

circumstances related to mental disorders was present.

i. Had readily available materials been provided to Dr. Stalberg, he would have made no diagnosis and reached no conclusion at all regarding Mr. Pinholster's mental status at the time of the offenses absent a comprehensive battery of neurological tests, including EEG and MRI tests, and a more extensive psychiatric history. He would also have materially modified his report regarding mitigating circumstances to indicate that there was voluminous mitigating evidence available on Mr. Pinholster's behalf. (See Declaration of Dr. John Stalberg, attached hereto as Exhibit A.)

3. Reasonable counsel would have explored issues relating to petitioner's mental state on the night of the homicides. Trial counsel knew that petitioner suffered from epilepsy, or seizure disorder. Trial counsel knew, or reasonably should have known, that petitioner has a substantial and significant history of mental disorders. Trial counsel reasonably should have known that there is a substantial and significant history of mental disorders within petitioner's family. Trial counsel knew, or reasonably should have known, that on the night of the offenses petitioner suffered auditory hallucinations and that his conduct was bizarre.

4. Reasonable counsel representing an individual accused of capital murder would have gathered the available mental health information, would have used this information to secure a timely and competent psychological and/or psychiatric evaluation of petitioner, and would have presented

this substantial evidence of petitioner's inability to form the requisite intent at trial.

5. Had trial counsel reasonably investigated, he would have learned that petitioner had a lengthy, well-documented history of profound mental illness. Reasonable investigation would have disclosed that during 1981 up to the time of the offenses petitioner suffered from severe seizure disorders, and from a bipolar mood disorder with psychotic features. Trial counsel would have learned that petitioner's bizarre behavior on the night of the offenses was a manifestation of, and reaction to, auditory hallucinations and a substantially impaired mental state caused by petitioner's neurological, psychological and psychiatric disorders. Reasonable and competent counsel would have used these facts to present and substantiate petitioner's psychological, psychiatric and mental state defenses.

6. The strong genetic link and familial predisposition regarding mood disorders, and specifically bipolar mood disorders, is well documented. The important family patterns in mood disorders are alcohol and/or drug abuse, depression, suicide, grandiosity and mood swings. All these features are markedly present in petitioner's family.

7. Petitioner suffers from seizure disorders. These disorders are severe and long standing. Petitioner's seizure history includes grand mal, complex partial and absence seizures, and is consistent with a number of independent diagnoses throughout his life.

8. Petitioner is innocent of the homicides. Assuming arguendo without conceding his presence at the scene and time of the homicides, his actions were a result of his organic disorders; petitioner did not premeditate or deliberate, and did not formulate the intent to kill.

9. As described above, petitioner suffers from a lengthy, well-documented history of severe mental disorders.

a. Petitioner's behavior during the episode at the Tapar residence demonstrates psychotic and grandiose thinking. Hearing voices from God is a symptom of a severe psychosis. Auditory hallucinations by definition reflect psychotic thinking. This type of psychotic thinking is symptomatic of a severe mood disorder, of a mood disorder at its extreme. Consistent with petitioner's epileptic history, the automatisms of purposelessly and repetitively stabbing the door reflect complex partial seizures. By the testimony of Ms. Tapar, this automatic behavior was combined with inappropriate facial expression and psychotic ideation, thereby displaying the synergistic relationship between petitioner's epilepsy and mood disorder.

b. At the time of the homicides petitioner was suffering from bipolar mood disorder and was suffering a complex partial seizure; further, there is substantial evidence that these mental disabilities were acting upon petitioner at the time of the homicides.

10. Trial counsel's acts and omissions were unreasonable and trial counsel had no reasonable

tactical purpose for these acts and omissions. Trial counsel had no reasonable tactical basis for his failure to conduct even the most cursory investigation, his failure to speak with family members, his failure to secure available medical and school records, his failure to interview counselors or medical providers, and his utter failure to prepare, consider or present available evidence of petitioner's innocence based on lack of mental state. Trial counsel's failure to consider, prepare and present available mental state defenses was not a reasonable tactical choice as it was based upon counsel's unreasonable failure to investigate. Trial counsel's actions were taken in default of knowledge that reasonable inquiry would have produced, and therefore in default of any judgment at all.

C. Trial counsel's failures were prejudicial.

1. It is reasonably probable that competent investigation and preparation would have disclosed that petitioner did not deliberate or premeditate the homicides, that he lacked the intent to kill, and that the killings were not a conscious act.

2. It is reasonably probable that had counsel obtained these records and provided them to a psychiatrist, he or she would have been able to present substantial expert testimony in support of petitioner's innocence of these murders, and of significant mitigating circumstances as delineated in § 190.3.

3. Counsel's failure to seek any psychiatric evaluation at all until the middle of trial is an eloquent statement of how little regard or sensitivity

counsel had to these issues. Counsel's failure to provide these materials to Dr. Stalberg misled him, and meant that he was not available to testify to possible innocence and to mitigating circumstances, as he would have been had the materials been made available to him. (See Declaration of Dr. John Stalberg, attached hereto as Exhibit A.)

4. The failure to provide these materials to Dr. Stalberg precluded anyone representing petitioner from conferring with his treating physician, Dr. Martin Dubin. Dr. Dubin, who died in 1987, could have provided Dr. Stalberg with information regarding petitioner's seizure disorder that is now unavailable.

5. All of the information regarding petitioner set forth above was available and should have been known to reasonably competent trial counsel. To the extent that it was unknowable to him, it is not only newly discovered evidence but also its nondisclosure is a product of petitioner's mental incompetence, that is, petitioner's inability to rationally understand the trial level proceedings and to assist counsel. Petitioner incorporates claim III as though fully set forth herein. The failure to discover this evidence so severely prejudiced petitioner during guilt phase and so clearly changed the balance of aggravation against mitigation during penalty phase, that its omission unquestionably altered the outcome during both guilt and penalty phases of trial.

D. Because the denial of the right to due process and a fair trial and trial counsel's constitutionally defective representation of petitioner fundamentally undermine the finding of guilt and the accuracy of

the capital sentencing determination in this case and thus implicate a fundamental miscarriage of justice, petitioner is entitled to habeas corpus relief.

II.

Ineffective assistance of a psychiatric expert

A. Petitioner was deprived of his right under Ake v. Oklahoma 470 U.S. 68 (1985) to the competent assistance of an appropriate psychiatric expert at both guilt and penalty phases due to his expert's failure to recognize, adequately investigate or consider significant mental health impairments of petitioner bearing upon his guilt of the crimes charged and upon issues of mitigation. These errors and failures violated petitioner's rights under state decisional and statutory law and his constitutional rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, in that petitioner was denied his right to effective assistance of counsel, his right to due process and a fair trial, his privilege against self-incrimination, his right to confrontation, his right to present a defense, his right to freedom from cruel and/or unusual punishment and his right to a reliable guilt and penalty determination in a capital case. The constitutional violation had a substantial and injurious effect on the verdict, and rendered the trial fundamentally unfair.

B. The facts that support this claim, among others to be developed after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigators and experts, and a hearing, are as follows:

1. Petitioner hereby incorporates all facts and claims of constitutional violations alleged elsewhere in this petition as though fully set forth herein.

2. On March 12, 1984, Dr. John Stalberg conducted a confidential psychiatric examination of petitioner at the county jail. This examination was conducted nine weeks after the beginning of trial and only days before petitioner was to testify at the guilt phase.

3. Dr. Stalberg perfunctorily, unreasonably and incompetently failed to adequately investigate, recognize or consider evidence of petitioner's significant mental health impairments. Ake v. Oklahoma 470 U.S. 68; 84 L. Ed. 2d 53 (1985). As a result, Dr. Stalberg failed to alert trial counsel that petitioner's organic disorders provided a mental state defense to the crimes charged; that petitioner had mental state defenses to other alleged crimes charged in aggravation during the penalty phase; that petitioner's mental disorders substantially mitigated the circumstances of the crime, as defined in § 190.3(a); that petitioner was under the influence of extreme mental and emotional disturbance at the time the offense was committed, as defined in § 190.3(d); that at the time of the offense petitioner's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, as defined in § 190.3(h); and that petitioner's mental state and history established additional psychological, psychiatric and social circumstances which extenuated the gravity of the offense as defined in § 190.3(k). This evidence was relevant to

both guilt and penalty issues.

4. The only materials reviewed or considered by Dr. Stalberg were a six-year-old probation report, and certain police reports of the homicide. A reasonably competent mental health expert would have secured necessary documents, or asked counsel to provide them, including mental health records, would have conducted a thorough mental status examination of petitioner, would have undertaken interviews of pertinent family members, doctors and others who could reasonably have been expected to have information necessary to a competent mental health evaluation, and would not have arrived at conclusions without an adequate factual foundation. The acts and omissions of petitioner's psychiatric expert were professionally unreasonable, and below the standard of care for mental health professionals serving as defense experts in capital cases. To the extent that Dr. Stalberg was misled by trial counsel to believe that he had been provided with all relevant materials, trial counsel was incompetent not only for failing to assemble and provide relevant materials, but also for misleading Dr. Stalberg.

5. Dr. Stalberg examined petitioner at the county jail on March 11, 1984, approximately nine weeks after the commencement of trial. The mental status evaluation contains no reference to petitioner's physical appearance, to his thought content, insight; or intellectual functioning, to his mood or affect, to his appropriateness, or to any other aspect of how petitioner presented during the interview. The report is so lacking in substance and foundation that it is impossible to determine the basis for Dr.

Stalberg's conclusions. Petitioner has no recollection of ever having seen Dr. Stalberg.

a. Dr. Stalberg was not provided with the wealth of social, genetic, familial and medical information readily available at the time of the evaluation, and instead relied upon meager and largely inaccurate information in arriving at his conclusions. It is professionally imperative that historical data be utilized to avoid the kind of misdiagnosis found in this instance. The history provided to Dr. Stalberg did not include: any information concerning petitioner's biological father, Garland Pinholster, including Garland's abandonment of petitioner and Garland's history which was consistent with bipolar mood disorder; evidence of a familial history of mood disorders and the suicide of the sibling closest to petitioner after escape from a mental hospital; evidence of a substantial pattern of self-medication by illegal drug use by not only all the Pinholster and Brashear children, but by Garland Pinholster as well; evidence of traumatic head injuries suffered by petitioner; evidence of a recurring cycle of withdrawn and hyperactive behavior by petitioner, traceable to and first documented in elementary school, which clearly documents the first recognition of mood disorder and other symptoms of profound disturbance; evidence of a long standing, diagnosed record of epilepsy: evidence of an abnormal EEG when petitioner was in elementary school; or evidence of petitioner's turbulent, violent home life marked by pronounced physical and emotional abuse and neglect.

b. The meager information Dr. Stalberg did rely on was largely inaccurate.

Contrary to Dr. Stalberg's report, petitioner was received at Camarillo State Hospital at age twelve; petitioner did receive medication while at Camarillo State Hospital; petitioner did receive anti-seizure medication at the county jail, including both Mysoline and phenobarbital; and petitioner did suffer at least one seizure after medication was terminated at the county jail.

c. Dr. Stalberg did not possess or review any of the copious past medical records concerning petitioner. In his brief comments Dr. Stalberg failed to adequately consider petitioner's neurological disorder. Dr. Stalberg dismissed this valuable diagnostic information instead of asking counsel to document it. This is forensically unacceptable, since the hallmark of a good psychiatric evaluation is to ferret out any possible organic pathology that may have an impact upon the case. Here, there is a wealth of information that should have been made available to, sought out by, and used by Dr. Stalberg, concerning head trauma, positive EEG findings, and treatment of seizure disorder from the time petitioner was a child through his incarceration for these charges.

d. Dr. Stalberg's report fails to offer any acknowledgement of or insight into the significance of petitioner's traumatic childhood and his dysfunctional family. This critical aspect of mitigation was not explored by Dr. Stalberg

e. Without having this readily available information, an interviewer could not recreate an accurate picture of petitioner. The conclusions that could be drawn from such a paucity

of information are constitutionally insufficient. Dr. Stalberg was ignorant of the extensive Pinholster family history of psychiatric diagnoses and treatment which spanned more than 15 years.

f. Dr. Stalberg concluded that petitioner suffered from antisocial personality disorder. Petitioner is a person who, although manifesting negative aspects in terms of his personality, still maintained significant empathy, the ability to relate well to others, and the ability to feel shame and remorse -- factors which are inconsistent with a diagnosis of antisocial personality disorder.

g. Dr. Stalberg's failure to consider and explore the abundance of available medical, social and psychiatric data, and his failure to notice, comment upon or seek to remedy its absence, wholly undermines his diagnosis of petitioner and his conclusions concerning petitioner's mental status.

h. The inadequacy of Dr. Stalberg's evaluation in light of the facts regarding petitioner's social, family and medical history, and his bizarre behavior on the night of the offenses, is vividly demonstrated by Dr. Stalberg himself, who now swears under penalty of perjury that had he been apprised of these facts, he would have written a very different report. (See Declaration of Dr. Stalberg, attached hereto as Exhibit A.)

k. Balancing the gravity of the circumstances against the brevity of the report, and balancing Dr. Stalberg's absolutist conclusions against the paucity of information and investigation supporting them, Dr. Stalberg's report is entitled to

little, if any, weight. The medical, genetic, familial and social histories which were available but which were not investigated, obtained or considered by Dr. Stalberg are fundamental to any competent psychiatric or psychological evaluation which purports to diagnose petitioner, to provide forensic analysis of petitioner's mental status on the night of the offenses and during trial, or to provide relevant forensic review of penalty phase issues.

6. Had a psychiatrist examined petitioner, reviewed pertinent medical and social records and reports of interviews with a number of family members and others, he or she would have concluded that petitioner suffers from grand mal, complex partial and absence seizure disorder and bipolar mood disorder with psychotic features.

a. Assuming arguendo without conceding his participation in the crimes charged, there is substantial evidence that based upon petitioner's mental disorders at the time of the offenses that he did not premeditate or deliberate the homicides nor did he harbor the intent to kill; further, based upon his mental disorders at the time of the offenses petitioner was not capable in fact of deliberation or premeditation or of forming the intent to kill. Further, there is substantial evidence that petitioner's consciousness was significantly impaired as a result of neurological and mood disorders at the time of the homicides, and that he was insane at the time of the offense.

b. The offenses with which petitioner was charged were committed while petitioner was under the influence of extreme mental

and emotional disturbance. At the time of the offenses petitioner's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was impaired as a result of mental disease or defect. There is substantial evidence of additional psychological, psychiatric and social circumstances which extenuate the gravity of the offense.

c. There is substantial evidence that petitioner was suffering seizures during incidents introduced in aggravation and described by prosecution witnesses Jack Taube, Cathy Smith and Officers Guzman and Kaufman, and that petitioner's movements (automatism) during those incidents were classic manifestations of complex partial seizures. As a consequence, petitioner's conduct during those incidents was not volitional.

C. Dr. Stalberg's errors were prejudicial and require reversal of petitioner's guilt and penalty determinations.

It is reasonably probable that if Dr. Stalberg had provided a competent evaluation of petitioner, trial counsel would have used this information to present petitioner's mental state defenses at the guilt phase, and additional evidence relevant and material to the jury's determination of the penalty. But for the unreasonable, incompetent and inaccurate evaluation by Dr. Stalberg, it is reasonably probable the results would have been different.

D. Because the denial of the right to due process, a fair trial and competent psychiatric assistance fundamentally undermined the accuracy of the guilt

and capital sentencing determinations in this case and thus caused a fundamental miscarriage of justice, petitioner is entitled to habeas corpus relief.

* * *

PENALTY PHASE

I.VIII.

Failure to investigate -- evidence in mitigation

A. Trial counsel unreasonably failed to investigate, prepare and present available mitigating evidence during penalty phase and in fact unreasonably presented evidence which injured petitioner's case in mitigation. These errors and failures violated petitioner's rights under state decisional and statutory law and his constitutional rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, in that petitioner was denied his right to the effective assistance of counsel, his right to due process and a fair trial, his right to confrontation, his right to present a defense, his right to freedom from cruel and/or unusual punishment and his right to a reliable penalty determination in a capital case. The constitutional violation had a substantial and injurious effect on the verdict, and rendered the trial fundamentally unfair.

B. The facts that support this claim, among others to be developed after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigators and experts, and a hearing, are as follows:

1. Petitioner hereby incorporates all facts and claims of constitutional violations alleged elsewhere in this petition as though fully set forth herein.

2. Trial counsel unreasonably and incompetently did minimal investigation and prepared no evidence for the penalty phase as of April 24, 1984, only days before the penalty phase began. [RT 7250.] The court invited defense counsel to make a motion to continue in order to prepare for penalty phase. Counsel unreasonably declined.[1] Counsel unreasonably failed to competently investigate, prepare and present relevant evidence and law in mitigation and/or relevant evidence and law pertinent to the prosecution's case in aggravation. Counsel's failure to investigate potentially mitigating penalty phase evidence prevented the presentation of a wealth of mitigating evidence and created a false impression there was no such evidence.

3. Trial counsel not only failed to investigate, prepare, and present the overwhelming and abundant mitigating evidence, but presented harmful, false evidence mischaracterizing petitioner's childhood and family life. The only evidence in

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[1]The Court: My question then would be to defense counsel, if the court should rule that there was sufficient notice given, and we are still inquiring into that, what would the defense position be with regard to proceeding.

Mr. Dettmar: I think we would probably still go forward on Monday [April 30, 1984]. Clearly the one person that comes to mind is the defendant's mother. How much beyond that I don't know. I don't think the passage of time would make a great deal of difference. [RT 7257:19-7258:1.]

mitigation introduced by defense counsel was the erroneous testimony of petitioner's mother, Mrs. Brashear. She presented misleading testimony regarding petitioner's childhood and family. She attempted to minimize rather than expose the severe abuse, neglect, dysfunction and violence that characterized petitioner's home life. Mrs. Brashear accepted no responsibility, and self-servingly and inaccurately laid all the blame on petitioner without reference to any family problems.

a. Mrs. Brashear testified on direct that petitioner pushed his stepfather to his limits and would not respond to discipline; that petitioner was disruptive at school, getting into fights and aggravating his brothers into getting into fights; that petitioner was a big show-off and tease; that petitioner got into trouble in the neighborhood and started stealing; that petitioner was arrested at ten and was placed into juvenile hall; that petitioner had something that was just not working right; that petitioner was unlike his brothers and sister, who were basically very good children; that petitioner was boastful and misbehaved; that petitioner was not materially deprived. Mrs. Brashear testified that petitioner felt that "our house was so nice that it ruined his image." [RT 7388-7404.]

b. On cross-examination, the prosecutor used a probation report to ask, "Did you ever describe him [petitioner] to his probation officer as being very aggressive to small children?" [RT 7411:25-26]; "mischievous around the neighborhood?" [RT 7412: 2]; "he [petitioner] did things like smashing the neighbor's milk bottles?" [RT 7412:11-12]; "all his relatives agreed he had no concern or consideration

for any other family members and was only tolerated because he was in fact a relative?" [RT 7414: 13-16]; describe Scott as "a dumb nothing?" [RT 7418: 1-2]; "a good bullshitter who likes others to believe he belongs to gangs when he doesn't?" [RT 7418:9-11]; and "you saw no hope for his rehabilitation?" [RT 7418:13-21].

4. As presented by petitioner's trial counsel, petitioner's home life as described during the penalty phase was idyllic: siblings who were functioning well [RT 7401]: a stepfather who was in the home for twenty years, and who was friendly to petitioner although pushed to the limit [RT 7393]; two working parents whose only fault may have been to provide a home that was so nice it ruined petitioner's image. [RT 7404.] Mrs. Brashear compared petitioner with his siblings, who were "basically very good children." Petitioner was not like the other children. [RT 7401.]

5. Trial counsel's unreasonable, incompetent and utter failure to investigate petitioner's background, including petitioner's educational, medical, psychological, social, or familial history, kept from the jury the wealth of mitigating evidence that was readily available. The reality of petitioner's background stood in stark contrast to the portrait created by petitioner's counsel. In truth, petitioner's home was turbulent, dysfunctional, violent and abusive. Petitioner's siblings suffered severe clinically diagnosed mental disorders and were involved in major criminal violations; his eldest brother had committed suicide after escaping from incarceration in a mental hospital. Petitioner had serious, well-documented educational disabilities.

Petitioner suffered from profound mental disorders. Had trial counsel reasonably and competently investigated evidence available in mitigation, he would have discovered the facts described below. Reasonable and competent counsel would have presented those facts in mitigation during the penalty phase of the trial.

a. As an infant petitioner was abandoned by his father. Petitioner's first five years were often spent with his maternal grandparents. Because he looked much like his father, a man loathed by his maternal grandparents, petitioner caught the brunt of the punishments inflicted in that home. After the death of his maternal grandfather, things became worse; Scott was essentially abandoned.

b. In 1962, petitioner's mother married Bud Brashear. During the children's early years in the Brashear household they were frequently ill-fed and unsupervised; they received no structure and little love. Burnice's pregnancies were accidental and unwanted; no one paid attention to the children or to what they were doing. No one cared.

c. Petitioner suffered physical and emotional abuse growing up with his stepfather, Bud Brashear, a man who resented Scott from the beginning as not only a burden he did not want to carry, but also one who resembled his natural father. Bud was a violent man who frequently beat petitioner when petitioner was a child; the beatings continued until petitioner left home. During these beatings Bud would use fists, belts or anything else

available, including on at least one occasion a two by four board. Bud hit petitioner with his fists as often as several times a week. Bud's punishments were unpredictable and severe. For instance, Bud was once awakened early, and made all of the children run in circles in the backyard to near collapse. There was so much violence in the home the petitioner and his brothers dreaded coming home each day. This situation grew worse as the children grew older.[2]

d. Bud's physical assaults created a cycle, petitioner reacting to the abuse with misbehavior, which generated further assaults by Bud against petitioner. As he grew up, petitioner received nothing at all positive from his stepfather. Bud never praised petitioner or did anything supportive of him. Petitioner's mother would occasionally make petitioner sleep in the family car to remove him briefly from his stepfather's wrath after Bud beat him, but petitioner's mother allowed the beatings and the verbal abuse to continue.

Lois Fosberg, a registered nurse and petitioner's maternal aunt, Terry Pinholster, petitioner's brother, and Tammy Brashear, petitioner's younger sister, were available to testify to these facts during petitioner's trial, but were never contacted by anyone from the defense.

e. Records from Tammy's probation

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[2] The only evidence introduced regarding violence in petitioner's home was so mild that the prosecutor was able to argue: "An appeal by the mother. She said his stepfather disciplined him. So what? I am sure you have disciplined your children. I was disciplined myself." [RT 7442:7-10.]

file also disclose that the household suffered from substantial family turmoil, in contradiction to Mrs. Brashear's trial testimony. Tammy was removed from the home at age fifteen, in mid-1981, as a result of a beating inflicted upon her by Bud Brashear. Contrary to the impression created during the penalty phase testimony, there was substantial marital discord in the Brashear home, culminating in a separation at the time of petitioner's trial. [3] Counsel made no effort to secure these records.

6. Petitioner's siblings' histories stand in sharp contrast to the false and unfair picture created by counsel, who portrayed petitioner as the black sheep of the family.

a. Available records regarding Tammy Brashear, petitioner's half-sister, demonstrate:

i. Tammy suffered from emotional lability, passive/aggressive behavioral patterns and alcohol abuse, all a result of the dysfunctional home.

ii. At age sixteen Tammy was made a ward for violation of Cal. Penal Code § 647(b), prostitution.

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[3] In contrast, Mrs. Brashear testified at trial

Q (By Mr. Brainard): Are you still married to Bud Brashear?

A (By Mrs. Brashear): Yes, I am.

Q: How many years have you been married now?

A: Twenty years. [RT 7392:11-14.]

iii. Tammy was once again arrested and made a ward of the juvenile court on April 11, 1984, Tammy admitted count II of the petition against her, a violation of Cal. Penal Code § 243.4, forcible sexual battery; dismissed upon the admission were a count of violation of Cal. Penal Code § 288(d), forcible oral copulation in concert and a count of violation of Cal. Penal Code § 288(b)(1), oral copulation with a minor. Generally, the charges alleged that Tammy assisted her boyfriend in forcible oral copulation upon a fourteen year old girl, then herself had forcible oral copulation with the victim.

iv. Tammy was made a ward of the court for the above serious charges on April 11, 1984. Less than three weeks later Mrs. Brashear was to testify that Tammy had "been in a little bit of trouble . . . mostly self-destructive to herself. She was a wild girl, she isn't any more." [RT 7401:22-24.]

b. Available records regarding petitioner's brother, Alvin, demonstrate:

i. Alvin was charged at age 20 for armed residential burglary, robbery, forcible oral copulation, two counts of forcible rape and two counts of forcible sodomy, all involving use of a firearm, and all alleging infliction of great bodily injury.

ii. At the time those charges were filed, Alvin had a burglary charge pending.

iii. In mid-1978, Alvin was declared incompetent on these charges pursuant to the provisions of Cal. Penal Code § 1368, et seq. and was held at Patton State Hospital. Alvin was

diagnosed during the court hearing and at Patton as suffering from severe schizophrenia. Doctors unanimously concluded he was psychotic, severely depressed (nearly catatonic) and suffered auditory hallucinations. Alvin had made serious suicide attempts prior and during his commitment to Patton. Alvin was given antipsychotic and antidepressant medication in large quantities while at Patton. He escaped confinement in 1979, and ultimately successfully committed suicide by drug overdose in Texas on July 28, 1980.

c. Available records concerning petitioner's brother Terry demonstrate he suffered from dysthymia (clinical depression).

7. Petitioner suffered severe disabilities in school which were not competently presented during trial.[4]

a. According to Lois Rainwater, one of petitioner's elementary school teachers:

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[4] Trial counsel unreasonably and incompetently failed to investigate petitioner's educational background. The prosecutor ridiculed the thought that petitioner was educationally handicapped. Without some corroborating evidence, either records or witnesses, this was an easy exercise.

Q (By Ms. D'Agostino): In kindergarten he was disruptive and had reading problems until the third grade when he was placed in classes for the educationally handicapped. Mrs. Brashear, isn't it true your son has continuously been rated as superior in I.Q.?" [RT 7413:1-8; emphasis added.]

Mrs. Brashear's answers indicating lack of knowledge were simply unpersuasive, and the prosecutor argued this issue effectively in closing. [RT 7446.]

i. Petitioner lived in an area where most families were transient and unstable. Petitioner's mother did not participate in the school like other mothers did. She was nonresponsive during conferences. Mrs. Rainwater never met nor heard about petitioner's stepfather. She felt that petitioner's family environment separated him from most of his classmates.

ii. Mrs. Rainwater referred petitioner for special Education evaluation. He clearly seemed in need of lots of extra help. He was two years behind grade level in all academic areas. She thought that petitioner's extreme restlessness and hyperactivity seemed to interfere with his learning. He was in constant motion, always fidgeting and grabbing for things. Petitioner seemed incapable of settling down. His hyperactivity was so extreme that Mrs. Rainwater formed the opinion it probably had an organic base.

iii. Petitioner was approved for special education. There were no openings at first and he was placed on a minimum day schedule of one hour per day. Petitioner's family moved again shortly after he was accepted for special education, and Mrs. Rainwater never saw him again.

iv. Petitioner fell through the cracks emotionally and every other way. There was no chance for a successful intervention because of the lack of family support and stability. The family's frequent moves only made the situation worse. In her opinion, petitioner was fed and clothed, but received no attention or structure at home.

Mrs. Rainwater taught at Coldwater Canyon Elementary School for twenty-one years, and was available to be interviewed and to testify during petitioner's trial, but was never contacted by anyone from the defense.

b. The school records still available demonstrate:

i. Petitioner was placed in classes for emotional and educationally handicapped children when he was nine, and remained there the next several years. Petitioner worked below grade level in all areas. He was retained at least once. Petitioner found himself in at least six different elementary schools by the fifth grade.

ii. Petitioner suffered from hyperactivity; because of this manic behavior, he was placed on a one hour limited day and was prescribed and took dilantin.

iii. Petitioner suffered progressive deterioration from kindergarten until at least the fifth grade.

iv. Petitioner's mother and stepfather were disinterested in petitioner's schooling and development.

8. School records, and records from Camarillo State Hospital, make abundantly clear that Mrs. Brashear had given up on Scott when he was still a young child, and was "burnt out" on motherhood, at least as it related to Scott. Scott was seen as an interloper who interfered with her

relationship with Bud Brashear, and was resented by her from the start of his life.

9. Petitioner suffered from grand mal, complex partial and absence seizures.[5] Petitioner's history of seizure disorder is well documented by independent medical diagnoses and several prescriptions for different anti-seizure medications.

10. Petitioner also suffers from a long standing bipolar mood disorder with psychotic features. Petitioner's compelling family histories of mental disorders, his severe head traumas during early childhood, his strong genetic links to mental illness, his predisposition to developing mood disorders, the pervasive family patterns of alcohol and/or drug abuse, and his early childhood mood variations between hyperactivity and withdrawal all substantiate the diagnoses of a profound lifelong mood disorder.

11. Petitioner's grossly dysfunctional family, the abuse he received as a Child, his history

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[5] Trial counsel made several abortive and incompetent efforts to introduce evidence of petitioner's seizure disorder to the jury through lay witnesses. [RT 5596 (Detective Coffey); RT 6015-6018 (Terry Pinholster); RT 6208-6209 (petitioner himself); RT 7314-7316 (Officer Kaufman); RT 7380-7383 (Cathy Smith); and RT 7397-7400 (Mrs. Brashear).] The prosecutor was able to exclude this evidence during guilt phase [RT 6208-6209], and ridicule the effort during penalty phase [RT 7443-7446] because counsel had unreasonably failed to secure available records confirming the existence of petitioner's seizure disorder and unreasonably failed to investigate and research the relevance and import of this substantial disability. Petitioner did suffer from seizure disorder and the evidence was relevant to a determination of penalty.

of suffering from substantial seizure and mood disorders, his frequently untreated psychiatric disabilities and his educational handicaps were relevant circumstances which would extenuate the gravity of the crime even though not a legal excuse for having committed these offenses. This evidence was relevant pursuant to § 190.3, factor k. The testimony of Mrs. Brashear, petitioner's mother, did not accurately or sufficiently describe these extenuating circumstances; indeed, her testimony created a false impression of a relatively stable home environment and a nuclear family with few problems and no real history of violations of the law.

12. Petitioner was substantially impaired by a bipolar mood disorder operating synergistically with seizure disorder at the time the crime was committed. These factors are clearly an extreme mental disturbance which affected petitioner at the time the offense was committed. As such this evidence was relevant pursuant to § 190.3, factor d. At the time of the offenses, petitioner's disorders impaired his capacity to appreciate the criminality of his conduct and/or to conform his conduct to the requirements of law. As such this evidence was relevant pursuant to § 190.3, factor h.

13. Trial counsel unreasonably and incompetently failed to investigate and present available mitigating evidence at the penalty phase. Histories disclosing petitioner's dysfunctional and abusive home life were readily available; counsel unreasonably and incompetently failed to undertake any investigation beyond a talk with petitioner's mother. Trial counsel knew Dr. Dubin's name and was told of the treatment petitioner was receiving.

The information provided by other immediate family members was available upon request. Readily available medical and school records provided a rich source of mitigating evidence. As trial counsel has conceded, he conducted no penalty phase investigation in this case. Reasonable counsel acting as a conscientious advocate would have investigated and presented the evidence in mitigation for the jury's consideration.

14. Trial counsel had no reasonable tactical basis for his failure to conduct even the most cursory investigation; his failure to speak with family members; his failure to secure available medical, school or other records; his failure to interview counselors or medical providers; his failure to accept the court's suggestion of a reasonable continuance to prepare for penalty phase; or his utter failure to prepare for penalty phase. These failures fall well below the standard of care in defending death penalty charges in Los Angeles County in 1983-1984. Trial counsel's failure to present available evidence in mitigation and his decision to reject a continuance were not reasonable tactical choices as they were based upon counsel's unreasonable failure to investigate.

C. Counsel's failure to investigate and present mitigating evidence prejudiced petitioner.

1. The evidence available in mitigation was and is weighty. Petitioner was abused as a child; petitioner grew up in an utterly dysfunctional family; petitioner suffered from serious mental impairment throughout his life; petitioner's conduct during the offense was largely influenced by severe genetic and

organic mental disorders. The jury was never allowed to weigh this compelling evidence when arriving at its penalty verdict. Most of the aggravating evidence relied upon by the prosecution was inadmissible and/or inaccurate. Had counsel investigated, prepared and presented the evidence available in mitigation, it is reasonably probable the penalty verdict would have been different. The absence of any investigation, and the availability of so much unpresented mitigating evidence, undermines confidence in the verdict rendered.

2. In addition to the evidence summarized above, petitioner could have obtained invaluable expert testimony on his behalf had he made it available to a psychiatrist. On the basis of this material, Dr. George Woods has reached the opinions summarized in paragraphs 11 and 12. The hastily arranged visit to Dr. John Stalberg in March of 1984, who was provided only with police reports and an old probation report, precluded any expert testimony on petitioner's behalf at trial, because Dr. Stalberg concluded that on the basis of what he saw, there was no evidence of brain damage or anything in mitigation of the offense. However, had Dr. Stalberg been shown the materials that a competent counsel would have collected, he would have withheld any opinion regarding Mr. Pinholster's mental status at the time of the offense pending further psychiatric inquiry and the results of a comprehensive battery of neurological tests, including EEG and MRI tests. He would also have materially modified his answer regarding mitigating circumstances, and told counsel there was <u>voluminous</u> mitigating evidence, including a childhood of physical abuse and emotional neglect, a family history of mental illness and criminal

behavior, as well as evidence of petitioner's own seizure disorder, repeated head trauma, evidence of some degree of brain damage, and an abnormal EEG. He would also have explained that there is a strong genetic/hereditary component to bipolar mood disorder and schizophrenia, and that Mr. Pinholster's epilepsy could have been mitigating because epileptics are more sensitive to drugs, and are prone to abnormal behavior of the type engaged in by Mr. Pinholster. (See Declaration of John Stalberg, attached hereto as Exhibit A.)

3. All of this information was available and should and could have been known to trial counsel. To the extent that it was unknown or unknowable to him, it is not only newly discovered evidence but also its nondisclosure is a product of petitioner's incompetence, i.e., his inability rationally to understand the trial level proceedings and to assist counsel. The failure to discover this evidence so severely prejudiced petitioner and so clearly changed the balance of aggravation against mitigation that its omission unquestionably altered the outcome of the trial.

D. Because trial counsel's constitutionally defective representation of petitioner fundamentally undermines the accuracy of the capital sentencing determination in this case and thus caused a fundamental miscarriage of justice, petitioner is entitled to habeas corpus relief.

DECLARATION OF HARRY WILLIAM BRAINARD

I, Harry William Brainard, do hereby declare as follows:

I was trial counsel for Scott Lynn Pinholster in the matter of People v Pinholster, Los Angeles Superior Court No. A800733.

I have reviewed the testimony of Joseph Barrett at R.T. 7383-7384.

I did not object to the testimony of Sergeat Barrett as violative of Massiah v United States (1964) 377 U.S. 201, 12 L. Ed. 2d 246 because Mr. Dettmar was primarily responsible for penalty phase matters.

I declare under penalty of perjury that the foregoing is true and correct, except those matters stated on information and belief, and as to those matters I believe them to be true.

Executed this 19 day of Dec., 1991, Los Angeles, California

[Signature]
HARRY WILLIAM BRAINARD

DECLARATION OF HARRY WILLIAM BRAINARD

I, Harry William Brainard, do hereby declare as follows:

I was trial counsel for Scott Lynn Pinholster in the matter of People v Pinholster, Los Angeles Superior Court No. A800733.

I have reviewed R.T. 7305-7307

It was Mr. Dettmar's responsibility to review Department of Corrections records. Although I felt that much of this evidence was inadmissible, I felt obligated to enter this stipulation because of Mr. Dettmar's agreement with the District Attorney.

I declare under penalty of perjury that the foregoing is true and correct, except those matters stated on information and belief, and as to those matters I believe them to be true.

Executed this 19 day of Dec., 1991, Los Angeles, California

[Signature]
HARRY WILLIAM BRAINARD

DECLARATION OF HARRY WILLIAM BRAINARD

I, Harry William Brainard, do hereby declare as follows:

I was trial counsel for Scott Lynn Pinholster in the matter of People v Pinholster, Los Angeles Superior Court No. A800733.

I have reviewed the following documents:

R.T. 7304-7305
Los Angeles Superior Court No. A139150, Hring. of April 27, 1978, R.T. 1-5

I assume the District Attorney represented to me during penalty phase that Geana Burdett was available as a witness in the event I refused to stipulate Scott Pinholster had in fact used a knife during commission of his prior kidnapping offense.

I declare under penalty of perjury that the foregoing is true and correct, except those matters stated on information and belief, and as to those matters I believe them to be true.

Executed this 19 day of Dec., 1991, Los Angeles, California

[Signature]
HARRY WILLIAM BRAINARD

DECLARATION OF HARRY WILLIAM BRAINARD

I, Harry William Brainard, do hereby declare as follows:

I was trial counsel for Scott Lynn Pinholster in the matter of People v Pinholster, Los Angeles Superior Court No. A800733.

I have reviewed R.T. 7290-7307

I did not interview Mr. Taube or anyone from the probation department prior to Mr. Taube's testimony. Since we had not had an opportunity to prepare evidence in mitigation, I felt (as I stated on R.T. 7296) it would be advantageous to allow the jury to simply hear as much about Mr. Pinholster as possible.

I declare under penalty of perjury that the foregoing is true and correct, except those matters stated on information and belief, and as to those matters I believe them to be true.

Executed this 19 day of Dec., 1991, Los Angeles, California

[Signature]
HARRY WILLIAM BRAINARD

DECLARATION OF HARRY WILLIAM BRAINARD

I, Harry William Brainard, do hereby declare as follows:

I was trial counsel for Scott Lynn Pinholster in the matter of People v Pinholster, Los Angeles Superior Court No. A800733.

I have reviewed C.T. (Supp) 24-25

I do not recall why I did not challenge Art Corona's testimony as being compelled, within the meaning of People v Medina (1974) 41 Cal.App.3d 438 and People v Green (1951) 102 Ca1.App.2d 867.

I declare under penalty of perjury that the foregoing is true and correct, except those matters stated on information and belief, and as to those matters I believe them to be true.

Executed this 19 day of Dec., 1991, Los Angeles, California

[Signature]
HARRY WILLIAM BRAINARD

DECLARATION OF HARRY WILLIAM BRAINARD

I, Harry William Brainard, do hereby declare as follows:

I was trial counsel for Scott Lynn Pinholster in the matter of People v Pinholster, Los Angeles Superior Court No. A800733. I have reviewed the following documents:

C.T. (Supp) 24-25
R.T. 4334-4337, 4969-4972 and 6635

I do not recall why I did not object, move to strike or move for a mistrial when, during her opening statement, the District Attorney's read a letter she had sent to Art Corona's attorney, Kenneth Lezin. I do not recall why I did not request a mistrial, or request the court strike all reference to the contents of the letter and render an appropriate admonishment to the jury after the court had excluded the letter and its contents from the trial.

I declare under penalty of perjury that the foregoing is true and correct, except those matters stated on information and belief, and as to those matters I believe them to be true.

Executed this 19 day of Dec., 1991, Los Angeles, California

[Signature]
HARRY WILLIAM BRAINARD

DECLARATION OF HARRY WILLIAM BRAINARD

I, Harry William Brainard, do hereby declare as follows:

I was trial counsel for Scott Lynn Pinholster in the matter of People v Pinholster, Los Angeles Superior Court No. A800733.

I have reviewed C.T. 250

I do not recall why I did not ask Art Corona what Beckett said as he (Beckett) entered the back yard.

I declare under penalty of perjury that the foregoing is true and correct, except those matters stated on information and belief, and as to those matters I believe them to be true.

Executed this 19 day of Dec., 1991, Los Angeles, California

[Signature]
HARRY WILLIAM BRAINARD

DECLARATION OF HARRY WILLIAM BRAINARD

I, Harry William Brainard, do hereby declare as follows:

I was trial counsel for Scott Lynn Pinholster in the matter of People v Pinholster, Los Angeles Superior Court No. A800733. I have reviewed the following documents:

A portion of the Los Angeles arrest reports prepared by Detectives Coffey and Quartararo on 1/29/82
C.T. 8-15 [The affidavit for search warrant (15225 Rayen Street)]
R.T. (Augm) 29-31
R.T. 3, 168-A, 137-153, 173-174, 5589-5590

I do not recall why I did not bring a 1538.5 motion regarding the evidence seized during the January 27 and 28, 1982, search of 15225 Rayen Street, Van Nuys, California.

I declare under penalty of perjury that the foregoing is true and correct, except those matters stated on information and belief, and as to those matters I believe them to be true.

Executed this 19 day of Dec., 1991, Los Angeles, California

[Signature]
HARRY WILLIAM BRAINARD

DECLARATION OF HARRY WILLIAM BRAINARD

I, Harry William Brainard, do hereby declare as follows:

I was trial counsel for Scott Lynn Pinholster in the matter of People v Pinholster, Los Angeles Superior Court No. A800733.

I have reviewed R.T. 6668-6670 and 7508-7509

I did not request individual voir dire of jurors to determine the impact of the Los Angeles Times articles entitled "Dragon Lady", a Terror in Court, and Former Social Butterfly Becomes "Dragon Lady" in Court because Mr. Dettmar too had spoken to the reporter and been quoted in the article; this created an awkward situation for the defense.

I declare under penalty of perjury that the foregoing is true and correct, except those matters stated on information and belief, and as to those matters I believe them to be true.

Executed this 19 day of Dec., 1991, Los Angeles, California

[Signature]
HARRY WILLIAM BRAINARD

DECLARATION OF HARRY WILLIAM BRAINARD

I, Harry William Brainard, do hereby declare as follows:

I was trial counsel for Scott Lynn Pinholster in the matter of People v Pinholster, Los Angeles Superior Court No. A800733.

I have reviewed R.T. 6531

I do not recall why I did not object to Detective Coffey's testimony that Terry Pinholster "told me that, 'No big deal,' his brother [Scott Pinholster] had been arrested for murder before. . . ." I had no information that Mr. Pinholster had ever been arrested for murder before, or that he had been a suspect in any murder other than the homicides of January 9, 1981.

I declare under penalty of perjury that the foregoing is true and correct, except those matters stated on information and belief, and as to those matters I believe them to be true.

Executed this 19 day of Dec., 1991, Los Angeles, California

[Signature]
HARRY WILLIAM BRAINARD

DECLARATION OF HARRY WILLIAM BRAINARD

I, Harry William Brainard, do hereby declare as follows:

I was trial counsel for Scott Lynn Pinholster in the matter of People v Pinholster, Los Angeles Superior Court No. A800733.

I have reviewed the following documents:

C.T. (Supp III) 43, 46, 57, 60-62 and 64

I do not recall why I did not object and move to strike the following materials from the tape recording played to the jury and transcription of the tape recording given to the jury:

Kathy Smith was raped as a result of a robbery by Scott Pinholster;

A shooting by Scott Pinholster in Sun Valley resulted in two wetbacks being killed;

Scott Pinholster knew a lot of the guys and homeboys involved in the Aryan Brotherhood;

Scott Pinholster had beat up an old lady, a matter the police knew about;

Talk of "some wetback guys getting killed up there in the hills instead of bars and stuff, more recent;"

Scott Pinholster was selling coke;

Scott Pinholster used to ask Art Corona to do burglaries; and

Scott Pinholster had just got out of the joint.

I declare under penalty of perjury that the

foregoing is true and correct, except those matters stated on information and belief, and as to those matters I believe them to be true.

Executed this 19 day of Dec., 1991, Los Angeles, California

[Signature]
HARRY WILLIAM BRAINARD

DECLARATION OF HARRY WILLIAM BRAINARD

I, Harry William Brainard, do hereby declare as follows:

I was trial counsel for Scott Lynn Pinholster in the matter of People v Pinholster, Los Angeles Superior Court No . A800733.

I have reviewed the following documents:

R.T. 2981-2983, 2991 and 6160

I do not recall why I elicited Scott Pinholster's kidnapping conviction after the court ruled that this conviction was inadmissible for impeachment purposes.

I declare under penalty of perjury that the foregoing is true and correct, except those matters stated on information and belief, and as to those matters I believe them to be true.

Executed this 19 day of Dec., 1991, Los Angeles, California

[Signature]
HARRY WILLIAM BRAINARD

DECLARATION OF HARRY WILLIAM BRAINARD

I, Harry William Brainard, do hereby declare as follows:

I was trial counsel for Scott Lynn Pinholster in the matter of People v Pinholster, Los Angeles Superior Court No. A800733.

I have reviewed the following documents:

R.T. 6383-6384 and 6895
Los Angeles Superior Court No. A139150, Hring. of April 27, 1978, R.T. 1-5

I do not recall whether I knew the knife enhancement allegation was not found true in Los Angeles Superior Court No. A139150 (Scott Pinholster's Penal Code §207 conviction).

I declare under penalty of perjury that the foregoing is true and correct, except those matters stated on information and belief, and as to those matters I believe them to be true.

Executed this 19 day of Dec., 1991, Los Angeles, California

[Signature]
HARRY WILLIAM BRAINARD

DECLARATION OF HARRY WILLIAM BRAINARD

I, Harry William Brainard, do hereby declare as follows:

I was trial counsel for Scott Lynn Pinholster in the matter of People v Pinholster, Los Angeles Superior Court No. A800733.

I have reviewed R.T. 6383-6384

I do not recall why I agreed to allow the District Attorney to recall Scott Pinholster to the stand after he had concluded his testimony.

I declare under penalty of perjury that the foregoing is true and correct, except those matters stated on information and belief, and as to those matters I believe them to be true.

Executed this 19 day of Dec., 1991, Los Angeles, California

[Signature]
HARRY WILLIAM BRAINARD

DECLARATION OF HARRY WILLIAM BRAINARD

I, Harry William Brainard, do hereby declare as follows:

I was trial counsel for Scott Lynn Pinholster in the matter of People v Pinholster, Los Angeles Superior Court No. A800733.

The strategy decided upon prior to trial was to demonstrate Scott committed robberies and not burglaries, and that Scott used guns, not knives, as weapons. I assumed Scott would admit to having committed a few robberies, not hundreds, although we never explicitly discussed the number. Part of strategy decided upon prior to trial was to admit the Croutch robbery during trial.

I declare under penalty of perjury that the foregoing is true and correct, except those matters stated on information and belief, and as to those matters I believe them to be true.

Executed this 19 day of Dec., 1991, Los Angeles, California

[Signature]
HARRY WILLIAM BRAINARD

DECLARATION OF HARRY WILLIAM BRAINARD

I, Harry William Brainard, do hereby declare as follows:

I was trial counsel for Scott Lynn Pinholster in the matter of People v Pinholster, Los Angeles Superior Court No. A800733.

Mr. Dettmar was primarily responsible for psychiatric, psychological, and other mental health issues in the case. We were aware prior to trial that Dr. Dubin and other health care providers had treated Mr. Pinholster for seizure disorder. I have no recollection of Mr. Dettmar having secured or reviewed any of Scott's medical records, nor did I see any of Scott's medical records. So far as I recollect, neither Mr. Dettmar nor myself interviewed any of Scott's previous medical providers.

I declare under penalty of perjury that the foregoing is true and correct, except those matters stated on information and belief, and as to those matters I believe them to be true.

Executed this 26 day of Dec., 1991, Los Angeles, California

[Signature]
HARRY WILLIAM BRAINARD

DECLARATION OF HARRY WILLIAM BRAINARD

I, Harry William Brainard, do hereby declare as follows:

I was trial counsel for Scott Lynn Pinholster in the matter of People v Pinholster, Los Angeles Superior Court No. A800733.

I do not recall interviewing or attempting to interview Scott's family members or any other persons regarding penalty phase testimony, except Mrs. Brashears, defendant's mother.

I have no recollection of seeing or attempting to secure Scott's school records, juvenile records, medical records, or records of prior placements (including his commitment to Camarillo State Hospital).

I have no recollection of interviewing or attempting to interview Scott's former school teachers, counselors, or juvenile officers.

I declare under penalty of perjury that the foregoing is true and correct, except those matters stated on information and belief, and as to those matters I believe them to be true.

Executed this 26 day of Dec., 1991, Los Angeles, California

[Signature]
HARRY WILLIAM BRAINARD

DECLARATION OF HARRY WILLIAM BRAINARD

I, Harry William Brainard, do hereby declare as follows:

I was trial counsel for Scott Lynn Pinholster in the matter of People v Pinholster, Los Angeles Superior Court No. A800733.

The only psychiatrist, psychologist or other mental health expert employed to evaluate mental health issues or defenses was Dr. John Stalberg, who was retained to prepare a report in March, 1984.

I declare under penalty of perjury that the foregoing is true and correct, except those matters stated on information and belief, and as to those matters I believe them to be true.

Executed this 26 day of Dec., 1991, Los Angeles, California

[Signature]
HARRY WILLIAM BRAINARD

DECLARATION OF HARRY WILLIAM BRAINARD

I, Harry William Brainard, do hereby declare as follows:

I was trial counsel for Scott Lynn Pinholster in the matter of People v Pinholster, Los Angeles Superior Court No. A800733.

The only investigators employed to assist us in preparation of the case were Quest Investigations, retained on February 29, 1984.

Forensics workup was Mr. Dettmar's responsibility. I know of no outside experts he employed to assist in retesting or evaluating the forensics evidence in the case.

I declare under penalty of perjury that the foregoing is true and correct, except those matters stated on information and belief, and as to those matters I believe them to be true.

Executed this 26 day of Dec., 1991, Los Angeles, California

[Signature]
HARRY WILLIAM BRAINARD

DECLARATION OF HARRY WILLIAM BRAINARD

I, Harry William Brainard, do hereby declare as follows:

I was trial counsel for Scott Lynn Pinholster in the matter of People v Pinholster, Los Angeles Superior Court No . A800733.

I have reviewed the following documents:

Clarence G. Collins' declaration dated November 16, 1991
R.T. 5649-5652

I was not told that the police had twice submitted the latent print lifted at the crime scene (People's No. 31) to the People's latent fingerprint expert who concluded at those times he could not match Pinholster's known print with that latent. I was not told that only upon a third submission did the People's expert conclude there was a match between the latent and Pinholster's known print.

Had I known the latent print was submitted twice with no match, I would have secured an independent latent fingerprint expert to reanalyze the conclusions of the People's expert.

Had I known Scott Pinholster did not deposit the latent print found at the Kumar residence, I would have conducted the defense differently, and would have appropriately changed my advice to my client. I probably would have advised Scott Pinholster not to testify during guilt phase.

I declare under penalty of perjury that the foregoing is true and correct, except those matters stated on information and belief, and as to those matters I believe them to be true.

DECLARATION OF HARRY WILLIAM BRAINARD

I, Harry William Brainard, do hereby declare as follows:

I was trial counsel for Scott Lynn Pinholster in the matter of People v Pinholster, Los Angeles Superior Court No. A800733.

I have reviewed R.T. 5730-5743

Scientific and forensic aspects of the case were Mr. Dettmar's responsibility. I do not recall why he did not:

Employ an criminalist to compare People's 36A & B (the shoe print left at the crime scene) to People's 39 (the boot found at Mr. Pinholster's apartment);

Determine whether the tread pattern found in People's 36A & B was remarkable or common.

I declare under penalty of perjury that the foregoing is true and correct, except those matters stated on information and belief, and as to those matters I believe them to be true.

Executed this 26 day of Dec., 1991, Los Angeles, California

[Signature]
HARRY WILLIAM BRAINARD

DECLARATION OF HARRY WILLIAM BRAINARD

I, Harry William Brainard, do hereby declare as follows:

I was trial counsel for Scott Lynn Pinholster in the matter of People v Pinholster, Los Angeles Superior Court No. A800733.

I have no recollection why I did not move to sever Count VI, the Croutch robbery. I do recollect we wanted to cast Scott as a robber, not a burglar; but I am now uncertain how that played a role in the decision not to move for severance of that count, or not to plead guilty to that count.

I declare under penalty of perjury that the foregoing is true and correct, except those matters stated on information and belief, and as to those matters I believe them to be true.

Executed this 26 day of Dec., 1991, Los Angeles, California

[Signature]
HARRY WILLIAM BRAINARD

DECLARATION OF HARRY WILLIAM BRAINARD

I, Harry William Brainard, do hereby declare as follows:

I was trial counsel for Scott Lynn Pinholster in the matter of People v Pinholster, Los Angeles Superior Court No. A800733.

I have reviewed the following documents:

The search warrant and affidavit for search warrant of 13922 Sayre Street

Police inventory report for Sayre Street search (4 pages)

R.T. Augmented 29-31

R. T. 168-A, 183-A, 4452-4455

I had not seen the search warrant or affidavit regarding Sayre Street prior to March 5, 1984. I do not recall why I did not bring a motion pursuant to Penal Code §1538.5 to suppress the use of evidence seized during the June 18, 1991 search at 13922 Sayre Street, Apartment No. 20, Sylmar, California.

I declare under penalty of perjury that the foregoing is true and correct, except those matters stated on information and belief, and as to those matters I believe them to be true.

Executed this 26 day of Dec., 1991, Los Angeles, California

[Signature]
HARRY WILLIAM BRAINARD

DECLARATION OF HARRY WILLIAM BRAINARD

I, Harry William Brainard, do hereby declare as follows:

I was trial counsel for Scott Lynn Pinholster in the matter of People v Pinholster, Los Angeles Superior Court No. A800733.

I was not provided a copy of Charles Kempf's Department of Justice "RAP" sheet prior to or during trial. I was not advised by the District Attorney's Office or any other government agency nor did I have actual knowledge of the following facts relating to witness Charles Kempf:

(1) Charles Kempf was arrested in Los Angeles County on 4/12/79 for violation of H&S § 11357(A) which was unresolved at the time of trial

(2) Charles Kempf was arrested in Los Angeles County on 1/1/80 for violation of PC § 488

(3) Charles Kempf was convicted in Los Angeles County of PC §484 and placed on probation on 8/4/80; Kempf was still on probation when he first testified in People v Pinholster

(4) Charles Kempf was arrested in Los Angeles County on 10/3/80 for violation of PC § 484F(2)

(5) Charles Kempf was arrested in Los Angeles County on 1/14/82 for violation of PC § 211, a matter unresolved at the time of trial in People v Pinholster

(6) Charles Kempf was arrested in Los Angeles County on 2/12/82 for violation of PC § 594(A) which the prosecution elected not to file

(7) Charles Kempf was charged in Los Angeles County on 3/10/82 by information with a violation of PC §459 in the first degree; Kempf was granted probation on this matter on 8/10/82 and continued to be on probation at the time of trial

(8) Charles Kempf was arrested in Los Angeles County on 6/21/83 for violation of HS § 11377, a matter unresolved at the time of trial

Had I been aware of the true facts I would have utilized these records for impeachment purposes and would not have called Gian Norelli as a witness.

I declare under penalty of perjury that the foregoing is true and correct, except those matters stated on information and belief, and as to those matters I believe them to be true.

Executed this 26 day of Dec., 1991, Los Angeles, California

[Signature]
HARRY WILLIAM BRAINARD

DECLARATION OF HARRY WILLIAM BRAINARD

I, Harry William Brainard, do hereby declare as follows:

I was trial counsel for Scott Lynn Pinholster in the matter of People v Pinholster, Los Angeles Superior Court No. A800733.

I was not provided a copy of Michael Kumar's Department of Justice "RAP" sheet prior to or during trial. I was not advised by the District Attorney's Office or any other State agency nor did I have actual knowledge of the following facts relating to witness Michael Kumar:

Michael Kumar was convicted in Los Angeles County in 1977 for violation of Health & Safety Code § 11359

Michael Kumar was convicted in Los Angeles County in 1981 for possession of marijuana.

Michael Kumar was convicted on 7/15/83 of Health & Safety Code § 11359 as a felony (a matter subsequent and unrelated to the homicide case)

Had I been aware of the true facts I would have utilized these records for impeachment purposes.

I declare under penalty of perjury that the foregoing is true and correct, except those matters stated on information and belief, and as to those matters I believe them to be true.

Executed this 26 day of Dec., 1991, Los Angeles, California

[Signature]
HARRY WILLIAM BRAINARD

DECLARATION OF HARRY WILLIAM BRAINARD

I, Harry William Brainard, do hereby declare as follows:

I was trial counsel for Scott Lynn Pinholster in the matter of People v Pinholster, Los Angeles Superior Court No. A800733.

I have reviewed R.T. 7249-7250; 7257-7258

Mr. Dettmar and I did not prepare a case in mitigation. We felt there would be no penalty phase hearing inasmuch as we did not receive written notice of evidence in aggravation pursuant to Penal Code §190.3.

I declare under penalty of perjury that the foregoing is true and correct, except those matters stated on information and belief, and as to those matters I believe them to be true.

Executed this 26 day of Dec., 1991, Los Angeles, California

[Signature]
HARRY WILLIAM BRAINARD

DECLARATION OF HARRY WILLIAM BRAINARD

I, Harry William Brainard, do hereby declare as follows:

I was trial counsel for Scott Lynn Pinholster in the matter of People v Pinholster, Los Angeles Superior Court No. A800733.

I have reviewed the one page report and the two page report attached to this declaration as Exhibits A and B

I was provided reports of Scott Pinholster's conduct while in the Los Angeles County jail, but those reports did not include Exhibit B. Had I had available Exhibit B, I would have used it to impeach or mitigate Sergeant Pigott's testimony.

I declare under penalty of perjury that the foregoing is true and correct, except those matters stated on information and belief, and as to those matters I believe them to be true.

Executed this 26 day of Dec., 1991, Los Angeles, California

[Signature]
HARRY WILLIAM BRAINARD

SUPPLEMENTAL DECLARATION OF JOHN M. STALBERG, M.D

I, John M. Stalberg, M.D., being duly sworn, depose and state as follows:

1. Pursuant to an order from Judge Daniel Kaufman, I examined Mr. Pinholster at the Los Angeles County Jail on March 11, 1984.

2. On March 14, 1984, I wrote a letter to counsel for the defendant, Mr. Wilbur G. Dettmar which summarized my conclusions regarding Mr. Pinholster's mental state at the time of the offense and mitigating circumstances.

3. On April 19, 1997, I executed a declaration regarding the materials which I received from Mr. Dettmar in connection with my examination of the defendant; these materials consisted of police reports of the case as well as a probation report prepared in 1978.

4. The purpose of this supplemental declaration is to set forth my custom and practice when I am retained by defense counsel in a capital case for an opinion regarding a defendant's mental state at the time of the offense and mitigating circumstances.

5. Because of the passage of time, I do not have a specific recollection of requesting medical, military, educational, and social records regarding Mr. Pinholster from his counsel, Mr. Wilbur Dettmar, when he contacted me in 1984. However, in every capital case, unless defense counsel affirmatively advises me that no relevant records exist which pertain to his client's mental status at the time of the offense or which reveal mitigating circumstances, I request him to provide me with any available, educational, military, and psychiatric records which may pertain to those issues. I also request disclosure of any such records which may relate to those issues

for a defendant's immediate relatives. I routinely make these requests of defense counsel so that I will have a reliable basis upon which to reach my conclusions. Based upon my routine practice, I believe that I made these request to Mr. Dettmar in 1984.

I DECLARE under penalty of perjury, that the foregoing is true and correct.

EXECUTED at S Monica, CA on 1-24-00.

[Signature]
JOHN M. STALBERG, M.D.

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Attorneys for Petitioner
SCOTT LYNN PINHOLSTER

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SCOTT LYNN PINHOLSTER,	CAPITAL CASE
Petitioner,	CASE NO. CV 95-6240-GLT
v.	DECLARATION OF DR. JOHN STALBERG
JEANNE WOODFORD, Warden of San Quentin State Prison,	
Respondent.	

I am a psychiatrist with offices at 2901 Wilshire Blvd., suite 415, Santa Monica, CA 90403. I have performed numerous forensic examinations at the request of prosecutors, defendants, and courts; my CV is attached. The purpose of this declaration is to expand upon and specify the factual bases for my opinions previously presented to this Court in my declarations dated April 19, 1997, and January 24, 2000, in particular regarding the voluminous

mitigating evidence which was available to trial counsel in 1984 to present in the penalty phase of Scott Pinholster's trial.

On March 11, 1984, I examined Scott Pinholster (hereinafter Scott, or Petitioner) at the Los Angeles County jail, pursuant to an Order from Judge Daniel Kaufman. I also reviewed some police reports of the case, and a probation report prepared in 1978. These materials were furnished to me by counsel for Mr. Pinholster, Wilbur G. Dettmar. On March 14, 1984, I wrote a letter to Mr. Dettmar which contained my conclusions regarding Mr. Pinholster's mental state at the time of the offense and mitigating circumstances. These conclusions were based on my examination of Mr. Pinholster and my review of the materials which Mr. Dettmar furnished to me.

It was my practice in every capital case at that time to request all medical, educational, military and psychiatric records of anyone I was asked to examine, and psychiatric records that may relate to those issues of a defendant's immediate relatives. I was not provided any such records. I was also not provided any of the police reports about the incident at Lisa Tapar's house the night of the homicides (see post., p. 15-16), or the police reports generated as a result of the incidents described by Officers Guzman and Kaufman in their penalty phase testimony.

My conclusion in 1984 was that Scott Pinholster [hereinafter referred to as Scott, or as petitioner], suffered from no mental disturbance at the time of the offense or at the time of the interview that had any legal significance, and I could see nothing by way of mitigating evidence. I was never again contacted by Mr. Dettmar, nor sent any other materials to review regarding petitioner.

Following my letter to Mr. Dettmar, I made no further inquiry into Scott's mental status until I received additional material from Michael Abzug

under cover of a letter dated April 17, 1997. This material consisted of hospital records, school records, documents regarding several other members of Scott's relatives, and declarations from several family members and a retired elementary school teacher who remembered Scott.

Based on this additional material, I materially modified my conclusions regarding the question of whether or not there were mitigating circumstances available to present to the jury. There was indeed voluminous mitigating evidence, including a childhood of physical abuse and emotional neglect, a family history of mental illness and criminal behavior, as well as evidence of Petitioner's own seizure disorder, repeated head trauma, evidence of brain damage, and an abnormal EEG. I also stated that there is a strong genetic/hereditary component to bipolar mood disorder and schizophrenia, and that Petitioner's epilepsy could have been mitigating because epileptics are more sensitive to drugs, and are prone to abnormal behavior of the type engaged in by Petitioner.

Since that date, I have reviewed the entire penalty phase transcript of Mr. Pinholster' s trial. I have reviewed Mr. Pinholster's Camarillo State Hospital records, police reports related to events described by prosecution witnesses during the penalty phase of the trial, and I have interviewed three of Mr. Pinholster's relatives: his mother, Burnice Brashear, his half-sister Tammy Brashear, and his maternal aunt, Lois Fosberg. I also spoke briefly with Sterling Fosberg, Lois's husband. The picture of Mr. Pinholster's family background and his mental health history presented at the penalty phase was profoundly misleading. It was not simply sketchy and incomplete, but was the opposite in important ways of what was the truth.

Facts

Scott Lynn Pinholster was born on January 25,

1959, the second of three boys from the union of Burnice Brashear and Garland Pinholster. His birth was six weeks premature. His older brother Alvin was born on January 23, 1958, and his younger brother Terry was born on October 17, 1960. The three boys were born in less than three years, to a mother who was seventeen years old at the time of Alvin's birth. Garland was never employed, and left the home when Terry was born. Scott had no further contact with his natural father.

The family survived on Burnice's earnings from a five-and-dime store, and support from Scott's maternal grandparents; Lois Fosberg babysat the boys for a year. His grandparents were strict and religious, and were extremely shaken when Burnice left the family home to live with Garland when she was sixteen years old. Scott looked much like his father, a man his grandparents as well as his mother and stepfather loathed.

Burnice married Bud Brashear in 1962. Tammy was born to Burnice and Bud on April 7, 1966. The children were all raised in chaos and poverty. Scott's aunt reports going to her sister's house and seeing the boys struggling with flour and water to make themselves food. The sparse furnishings were invariably covered with stale food and wrappers. She and her husband seriously discussed taking the boys in, but could not do so because of obligations to their own children.

Scott suffered two known major head injuries in his early years. He was run over by his mother's vehicle and received serious head injuries in July, 1961, when he was two and one-half years old. He was kept in the hospital three days during recovery. About one year later, Scott was seated in the front seat of his mother's vehicle when she was involved in another automobile accident, he hit his head on the front window with sufficient force to break the windshield.

Burnice and Bud worked intermittently, and were preoccupied with their own affairs. During the children's early years in the Brashear household they were frequently ill-fed and unsupervised; they received no structure and little love. Burnice's pregnancies were accidental and unwanted. No one paid attention to the children or to what they were doing. No one cared.

Bud quickly became resentful of the boys, and beat them -- with his fists, with a belt, and at least once with a two-by-four board. Scott, who by all accounts most resembled Garland, bore the brunt of Bud's rages. Bud continued beating Scott until he left home, hitting him with his fists as often as several times a week. Bud's punishments were unpredictable and severe. Terry recalls an occasion when Bud was awakened early, and made all of the children run in circles in the backyard to near collapse. There was so much violence in the home the Petitioner and his brothers dreaded coming home each day. This situation grew worse as the children grew older.

Tammy relates that Bud's physical assaults created a cycle; Scott reacting to the abuse with misbehavior, which generated further assaults by Bud against him. As he grew up, Scott received nothing at all positive from his stepfather. Bud never praised Scott or did anything supportive of him. Scott's mother would occasionally make him sleep in the family car to remove him from his stepfather's wrath after Bud beat him, but she allowed the beatings and the verbal abuse to continue.

Lois Fosberg, a registered nurse and Petitioner's maternal aunt, Terry Pinholster, and Tammy Brashear were all available to testify to these facts during Petitioner's trial, but were never contacted by anyone from the defense, and never brought to my attention. Testimony of family members is potentially valuable mitigating evidence.

I have no independent recollection of why I made no efforts to speak with members of Scott's immediate family. However, the 1978 probation report I was provided states that "all his relatives agreed he had no concern or consideration for any other family members and was only tolerated because he was in fact a relative." It is very likely that I assumed from this report that any effort on my behalf to contact these relatives would only generate negative material which I would have been bound to include in my report regarding Scott.

Records from Tammy's probation file indicate that the household suffered from substantial family turmoil at the time of petitioner's trial. Tammy was removed from the home at age fifteen, in mid-1981, as a result of a beating inflicted upon her by Bud Brashear. Contrary to the impression left by Burnice during her penalty phase testimony, there was marital discord in the Brashear home; culminating in a separation at the time of Petitioner's trial. Burnice testified at the penalty phase of his trial that Scott was a black sheep of the family, in contrast to his siblings, who were basically very good children who were functioning well. This testimony is flatly refuted by the siblings' own testimony, and by their documented history.

Available records regarding Tammy indicate that she suffered from emotional lability, passive/aggressive behavioral patterns and alcohol abuse, all a result of the dysfunctional home. At age sixteen Tammy was made a ward for violation of Cal. Penal Code § 647(b), prostitution. Tammy was again arrested and made a ward of the juvenile court on April 11, 1984. She admitted Count II of the petition against her, a violation of Cal. Penal Code § 243.4, forcible sexual battery; dismissed upon the admission were a count of violation of Cal. Penal Code § 288a(d), forcible oral copulation in concert a count of violation of Cal. Penal Code § 288(b)(1), oral copulation with a minor. Generally, the charges alleged that Tammy assisted her boyfriend in forcible

oral copulation upon a fourteen-year-old girl, then herself had forcible oral copulation with the victim. Tammy was made a ward of the court for the above serious charges on April 11, 1984, during Scott's trial.

Alvin Pinholster was charged at age twenty for armed residential burglary, robbery, forcible oral copulation, two counts of forcible rape and two counts of forcible sodomy, all involving use of a firearm, and all alleging infliction of great bodily injury. At the time those charges were filed, Alvin had an additional burglary charge pending. In mid-1978, Alvin was declared incompetent on these charges pursuant to the provisions of Cal. Penal Code § 1368, et seq. and was held at Patton State Hospital. Alvin was diagnosed during the court hearing and at Patton as suffering from severe schizophrenia. Doctors unanimously concluded he was psychotic, severely depressed (nearly catatonic) and suffered auditory hallucinations. Alvin had made serious suicide attempts prior and during his commitment to Patton. He was given antipsychotic and antidepressant medication in large quantities while at Patton. He escaped confinement in 1979, and ultimately successfully committed suicide by drug overdose in Texas on July 28, 1980.

Available records Petitioner's brother Terry demonstrate that in 1977, he suffered from dysthymia (clinical depression). Terry was able to leave the Los Angeles area and establish and maintain a moderately successful business in Hawaii installing swimming pools with the proceeds of a settlement he received for an accident as teen-ager.

Petitioner suffered severe disabilities in school. According to Louise Rainwater, one of Petitioner's elementary school teachers, Scott lived in an area where most families were transient and unstable. His mother did not participate in the school like other mothers did. She was nonresponsive during conferences. Mrs. Rainwater never met nor heard

about Scott's stepfather. She felt that Scott's family environment separated him from most of his classmates.

Mrs. Rainwater referred Scott for Special Education evaluation. He clearly seemed in need of lots of extra help. He was two years behind grade level in all academic areas. She thought that Petitioner's extreme restlessness and hyperactivity seemed to interfere with his learning. He was in constant motion, always fidgeting and grabbing for things. Petitioner seemed incapable of settling down. His hyperactivity was so extreme that Mrs. Rainwater formed the opinion it probably had an organic base.

Petitioner was approved for special education. There were no openings at first and he was placed on a minimum day schedule of one hour per day. Petitioner's family moved again shortly after he was accepted for special education, and Mrs. Rainwater never saw him again. Ms. Rainwater relates that Scott fell through the cracks emotionally and every other way. There was no chance for a successful intervention because of the lack of family support and stability. The family's frequent moves only made the situation worse. In her opinion, Petitioner was fed and clothed, but received no attention or structure at home. Mrs. Rainwater taught at Coldwater Canyon Elementary School for twenty-one years, and was available to be interviewed and to testify during Petitioner's trial, but was never contacted by anyone from the defense.

Ms. Rainwater is extensively corroborated by the school records still available. Scott was placed in classes for emotional and educationally 'handicapped children when he was nine years old, and remained there the next several years. He worked below grade level in all areas. He was retained at least once. Petitioner found himself in at least six different elementary schools by the fifth grade.

Scott clearly suffered from hyperactivity. Because of this behavior, and because of the neurologist's report, he was placed on a one hour limited day and was prescribed and took Dilantin, an anti-seizure medication. Scott suffered progressive deterioration from kindergarten until at least the fifth grade.

Scott's mother and stepfather were not interested in Petitioner's schooling and development. School records, and records from Camarillo State Hospital, make clear that Mrs. Brashear had given up on Scott when he was still a young child, and was "burnt out" on motherhood, at least as it related to Scott. Scott was seen as an interloper who interfered with her relationship with Bud Brashear, and was resented by her from the start of his life.

By the time he was in elementary school, Scott was talking to himself continuously. Teachers noted "many grimaces." By age nine he was referred for neurologic examination because of his hyperactivity. During a three-day admission to Sierra Memorial Hospital on March 22, 1968, Scott was given an EEG examination that portrayed an unusually disorganized and abnormal pattern of brain waves. During that admission, the neurologist Dr. Marvin Korbin diagnosed Petitioner with epilepsy.

Scott's epilepsy and seizure disorder was again diagnosed by Dr. Z. F. Lucaric in October, 1968. Scott's medication prior to 1968 is unknown, but in 1968 was changed to Dilantin, an anti-seizure medication.

In contrast to hyperactive behavior, early school reports also document that at times Scott "appears to have given up, defeated, withdrawing, head down." School authorities noted Petitioner's affect was inconsistent, apparently quite contradictory. These records reflect that Petitioner suffered night terrors, nail biting, hyperactivity and tantrums. He "fought in his sleep," he talked and

walked around during the night; spanking was not effective; he had dizzy spells after taking medication; he drew a bizarre figure in a draw-a-person psychological test. He was referred to and seen by the San Fernando Child Guidance Clinic.

Official records consistently reflect that Burnice had no interest in his school or developmental difficulties. The family's frequent moves meant that by 1968, at age nine, Scott had attended six different elementary schools.

Scott's problems at home, primarily with Bud, continued, and markedly worsened after the death of Scott's maternal grandfather in 1968. Scott ran away from home, was placed in Juvenile Hall for three months. He was then sent to Camarillo State Hospital in 1970, where at the age of eleven, he stayed for nearly five months. There, the admission history noted that Bud resented having to pay for the raising of three boys born to another man, and that he "has given up on Scott and threatened his wife with divorce if Scott does not improve." According to Scott's admission history, his mother thought that "he is shifty, just like his father." The Camarillo doctor summarized in his September 15, 1970, admission report: "Scott . . . resembles his father, heartily hated by his mother." Burnice Brashear also stated to the admissions staff at Camarillo testimony years later.

It was apparently what she wanted to believe, but it was far from the truth. Scott's older brother and mentor, Alvin, manifested symptoms of severe mood disorder throughout his life. As noted above, he abused drugs, committed serious crimes, was found incompetent to stand trial, was diagnosed as severely psychotic, was heavily medicated, and ultimately committed suicide after escaping from Patton State Hospital.

Despite Alvin's history of severe psychosis and depression, he is remembered by family as usually

upbeat and charming. Alvin presents a history typical of the extreme mood swings that accompany serious bipolar disorder. The anti-psychotic medication given to Alvin at Patton (Stelazine, Mellaril, Benadryl for side effects) was designed to control agitation and depression, the hallmarks of mood disorder.

The history of psychiatric disorders endemic to the Pinholster family extends to Scott's father Garland, and to Garland's sons by other women. Garland is an alcoholic. He has been married approximately nine times, including a number of bigamous marriages. He is described as charming upon introduction, then explosive. He falls into "black periods," and his moods are cyclical. He has periods of great productivity, and periods when matters seem out of his control.

Garland's history suggests that he suffers from bipolar mood disorder. His son Guy, Scott's paternal half-brother, has been diagnosed as being afflicted with bipolar mood disorder. Guy has been hospitalized for his bipolar disorder and was responsive to lithium treatments. As of 1993, Guy was hospitalized for treatment of a recurring episode of his mood disorder.

When Scott was released from Camarillo on January 29, 1971, the prognosis was guardedly optimistic: "Scott does not need to stay in a mental institution. He needs [a] close relationship with warm and firm parental figure whose system of values he could incorporate. A good foster home would be best for him, but a group setting where firm controls and good models are present is also acceptable." His diagnosis: "Psychiatric -- unsocialized aggressive reaction of childhood; Physical -- healthy and well developed boy." Instead, he was sent home.

Bud Brashear got a job working at a Hollywood studio when Scott was in his teens, and

the Brashears were able to move into a better neighborhood. Their indifference to their children, however, did not change. Tammy spent several days hitchhiking with an older adolescent male when she was thirteen or fourteen years old. Neither Burnice nor Bud attempted to find her or to call the police; they figured she would eventually come home.

According to Scott's sister, he became addicted to heroin after the death of his older brother Alvin in 1980. His seizures also became a greater factor in his life. Dr. Martin Dubin had been prescribing anti-seizure medication for Scott since at least 1979, and treated him for epilepsy through late 1981. Dr. Dubin treated Scott's seizures with Mysoline, phenobarbital and Dilantin. Diagnoses included grand mal, absence and complex partial seizures.

Scott entered the Holy Cross Hospital complaining of chest pains on August 24, 1980; this was diagnosed as hypotension secondary to heroin induced cardiomyopathy. After several hours at the hospital Petitioner was injected with five mg. of Haldol, an anti psychotic medication, to control "extreme agitation." Dr. Dubin again diagnosed Petitioner's epilepsy and prescribed Dilantin on August 24, 1981. Dr. Dubin noted that Petitioner continued to need anti-seizure medication for his epilepsy, and considered changing his medication from Dilantin to Mysoline; an entry of August 27, 1981, notes a prescription for Mysoline, and a drug screen from August 27, 1981, revealed the presence of phenobarbital, a generic category of drugs of which Mysoline is a member.

During the penalty phase, Officer Guzman testified that on August 24, 1981, he was assigned to narcotics enforcement.[6] Around 4:45, he placed

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[6] This date appears to be wrong. The police report was changed from August 24, 1981, to August 25, 1981, and the hospital records where Scott was taken before being booked into

(continued...)

Petitioner under arrest. He placed Scott in handcuffs, and asked him to get into the police vehicle. Scott refused. When Guzman attempted to force him, Scott became rigid and suddenly dropped to the floor as if he was having a "spasmatic" attack. He remained on the floor for 15-30 seconds. Guzman and his partner then picked up Scott, who "appeared to be fine." and placed him in the police vehicle. Along the way to the station, Scott started swearing and became agitated and violent; he had to be restrained with a leather belt. At the police station, he complained that the had bent his knees backwards when they tied his feet, and bent a pin in his knee. The officers took Scott to a hospital, where he spat at the officers and on the floor and had his mouth taped; he continued to physically resist at every step, and kicked out at the glass on an x-ray machine. RT 7322-7327.

The police report of this incident indicates that Scott was standing talking to an unidentified Mexican when Guzman and his partner drove past them; they determined to stop and arrest him because he had "droopy eyelids and slow body movement;" they noticed tracks on his arms when they approached.

Hospital records indicate that Petitioner was received at U.S.C. Medical Facility for prebooking following this arrest on August 25, 1981. The hospital noted that Scott had two surgical bolts in his right knee, and old scars from surgery to remove cartilage in his left knee. His knees were OK. Scott was also treated for epilepsy. The attending physician gave Petitioner 500 mg. of Mysoline, a loading dosage and double Petitioner's usual dosage. Scott was characterized as "alert and cooperative."

(...continued)
county jail indicate that the date was August 25, 1981. See Guzman Police Report, U.S.C. Hospital Records, Exh. 35

Petitioner was seen at Holy Cross Hospital a week later, on September 1, 1981, and the treating physician offered a diagnosis of seizure history and noted prescriptions for phenobarbital and Mysoline. Bronchitis was also noted; petitioner had a persistent cough. This incident was part of another encounter with the police, this time with Officer Kaufman. During penalty phase, Officer Kaufman testified that on August 1, 1981 (the correct date is clearly August 31, 1981), he received a disturbing the peace call and attempted to question Petitioner, who became belligerent and refused to cooperate in the investigation. Petitioner then told Kaufman he was going to have a seizure, and then fell on the ground and appeared to have a seizure. Kaufman thought it was phony. The primary reason for this belief seemed to be that Scott had announced it ahead of time. Kaufman described the seizure as follows: "He clenched his eyes real tight, fell on the ground, became rigid, rolled back and forth, rolled to his right once, rolled to his left once." RT 7311: 1-11. Kaufman handcuffed him because he was rolling on the ground toward items of clothing that Kaufman had not been able to search (there turned out to be no weapon found). When Scott tried to pull away from Kaufman's partner, Kaufman maced him. Petitioner was taken to a hospital, at which time he kicked Officer Kaufman. RT 7309-7312.

Petitioner had separate hospital admissions into that hospital on September 12, 13 and 14, 1981. On September 12, 1981, a prescription for Dilantin and phenobarbital, anti seizure medications, was noted. On September 13, 1981, although Petitioner was admitted for bronchial congestion, the attending physician prescribed a 10 mg. dose of Diazepam, commonly known as Valium, a medication appropriate for seizures and/or acute anxiety attacks. Once again, on September 14, 1981, phenobarbital medication is noted. During penalty phase, Cathy Smith, Petitioner's wife, testified that on that date, Petitioner broke her jaw. She testified she believed Petitioner may have been in the throes of a seizure or

may have been faking a seizure.

On September 22, 1981, Dr. Dubin referred Petitioner to Pacoima Memorial Hospital based upon Petitioner's severe symptomatology; Dr. Dubin's referral included a primary diagnosis of convulsive seizure disease. On that same date, Petitioner was seen by Dr. N. Paul Rosenthal at Pacoima Memorial Hospital. Dr. Rosenthal noted a history of seizure disorder. Cathy Smith, then Petitioner's girlfriend and not his wife, described to Dr. Rosenthal a seizure suffered by Petitioner one week earlier.

Following Petitioner's three-day stay in the hospital between September 22 and 24, 1981, Dr. Rosenthal diagnosed Petitioner as suffering from generalized seizure disorder, etiology undetermined. He arrived at his independent diagnosis based upon clinical signs, symptoms and history in spite of a normal EEG. It was recommended that Petitioner be sent to Hope Psychiatric Institute. This never occurred.

The commitment offense took place 3 1/2 months later, on January 8, 1982. According to prosecution witness Art Corona, Scott asked to be taken to Lisa Tapar's house while en route to the scene of the crime.[7] When Lisa Tapar answered the front door, she saw petitioner, who announced, "I have a message from God." Lisa slammed the door shut. Petitioner knocked on the door again; Tammy Ramonelli opened and then slammed the door shut. Petitioner proceeded to stab the front door repeatedly with his knife, using such force that the occupants inside saw the point of the knife actually come through the door. Petitioner then went to Lisa's automobile and carved emblems into the fender: lightning bolts, symbols that Ms. Tapar thought had

[7] Contemporary police reports indicate that this happened after rather than before the crime. However, for purposes of this report, I accept the testimony of Art Corona.

to do with Nazis. According to his wife Cassey, Art told her that during the commission of the offense, petitioner was "acting crazy."

According to numerous witnesses, petitioner was very intoxicated on the evening of January 8, 1982. Art Corona testified that petitioner was drinking tequila and whiskey. [RT 4904-4905.] He was "tying one on," said one witness. [RT 5893.] He was drinking out of a "five gallon Sparkletts bottle with some homemade alcohol" and "he had a bag of marijuana," another witness; by 11:30 p.m. he was "more or less" drunk. [RT 6010-6011, 6015, 6036.] A fourth witness said that petitioner had "five, six, seven ounces of weed" that he was "smoking away" and that he was drinking out of "a big five gallon thing of some homemade stuff." [RT 6061, 6070.] A fifth witness said that by about 11:00 p.m. petitioner "was drunk . . . I thought he was going to pass out." [RT 6087.] And a sixth, who left the party and returned very late, said that by 2:15 a.m. petitioner "was pretty well drunk." [RT 6324.]

Opinions

a. Family Background

The picture portrayed at trial by a very defensive Burnice Brashear was profoundly misleading. Petitioner's early childhood was marked by significant deprivation, physical abuse, and extreme neglect.

b. Mental Disturbance: General

Several of Petitioner's immediate relatives demonstrate, either by behavior or by formal diagnosis, bipolar mood disorders and schizophrenia. Several studies, including studies of identical twins separated from birth, have established that there is a very strong genetic component to mood disorders. Petitioner's behavior presents several examples of the grandiosity and depression that are the

hallmarks of a mood disorder.

Petitioner was born six weeks early. Such a premature birth is a risk factor for brain damage; there is an increased likelihood of intra-cranial bleeding and improper or incomplete brain maturation. He suffered two serious head injuries as a two and three-year-old. Two such injuries can be devastating; with one such injury there may well be either damage or an exhaustion of the brain's reserves, making the brain far more vulnerable when the next injury strikes than it otherwise would have been. He was diagnosed as epileptic as a child, and treated with medication; both his hyperactive behavior (inability to focus, agitated movements, etc.) and an abnormal EEG show evidence of brain damage.

Epilepsy is essentially an electronic irritation in the brain, generally resulting from small scars. A minor brain injury in the period surrounding birth or an inherited tendency towards having seizures may produces the episodes; head trauma, particularly at an early age, may well produce slight scarring of the brain, with resulting seizures.

Epilepsy is related to drugs, in the following manner:

(1). Alcohol It is generally accepted that perhaps the most likely trigger for a seizure is the stage of "coming down" from drinking alcohol. Therefore, it is strongly recommended to epileptics that they not drink at all.

(2) Phenobarbital During the 14 years or so that Scott was treated for epilepsy, much of the treatment seems to have been with Mysoline or other phenobarbitals. These are general central nervous system depressants. The problem with such drugs is that they need to be taken on a strict schedule. Otherwise, when the drug effect lifts, there is a "rebound" of the nervous system, and a significantly

heightened chance of a seizure occurring. The drugs of choice for the past twenty years have been Dilantin, Tegrotol, and several new drugs within the past few years that greatly lessen the risk of this rebound effect. The newer drugs used to treat epilepsy are now commonly used to also treat bi-polar disorder.

In the late 1970's Mr. Pinholster was treated for epilepsy by his family doctor, and he suffered several seizures in the months prior to the crime's commission in the months prior to January of 1982. There was substantial evidence available in 1981 that petitioner suffered from both bipolar mood disorder and seizure disorder.

c. Mental Disturbance: the Guzman Incident

Petitioner quite likely suffered a complex partial seizure on August 25, 1981, at the time he was arrested by Officer Guzman. Petitioner has a long history of acute and chronic seizures and abnormal brain functioning stretching back to when he was nine years old. Of course, it is possible that he was faking a seizure; existing records are too sketchy to permit any certainty. However, seizures are often triggered by stress, and the sudden appearance of the police while he was standing and talking, the placement under arrest, and being placed in a police car was surely stressful. The conduct described by Officer Guzman is consistent with a genuine seizure. The sequence described by Guzman of Scott being compliant after the seizure, and then launching into a barrage of threats and kicks while being driven down the freeway could well have been a product of what is known as post-ictal confusion, a state that frequently follows a seizure. Some people become agitated and combative after a seizure, because of post-ictal confusion. The conduct described by Officer Guzman is not only consistent with and suggestive of a complex partial seizure and its aftermath, but was clinically treated as such by the U.S.C. medical staff. When seen pre-booking at

U.S.C. Medical Center, the attending physician gave Petitioner 500 mg. of Mysoline, a loading dosage and double Petitioner's usual dosage. In contrast to Officer Guzman's trial testimony, the hospital noted that petitioner was "alert and cooperative." Additionally, Petitioner was seen by Dr. Dubin on August 24, the day before this incident. At that time Petitioner was again diagnosed as epileptic, and Dr. Dubin was considering changing his medication from Dilantin to Mysoline. A drug screen from August 27, 1981, two days after the incident, revealed only the presence of phenobarbital, one of Petitioner' s prescribed anti-seizure medications.

d Mental Disturbance: The Cathy Smith Incident

Petitioner probably suffered a complex partial seizure on September 14, 1981, at the time he injured the jaw of Cathy Smith. Petitioner has a history of such seizures Petitioner had several hospital admissions during the time in question, including separate admissions into Holy Cross Hospital on September 12, 13 and 14, 1981. On September 12, a prescription for Dilantin and phenobarbital, anti-seizure medication, was noted On September 13, although Petitioner was admitted for bronchial congestion, the attending physician prescribed a 10 mg. dose of diazepam, an anti-convulsive appropriate for seizures and/or acute anxiety attacks. Once again, on September 14, phenobarbital medication is noted. On September 22, Dr. N. Paul Rosenthal noted a history of seizure disorder. Dr. Rosenthal diagnosed a seizure disorder based upon his clinical findings, history and physical examination despite a normal EEG. Cathy Smith offered a description of a seizure one week earlier; there is no evidence contemporaneous with the incident that she or anyone else doubted it was a seizure.

e. Mental Disturbance: the Officer Kaufman Incident

Petitioner probably suffered a grand mal or complex partial seizure on August 31 or September 1, 1981, at the time of his arrest by Officer Kaufman. At the time, Kaufman noted that Petitioner displayed symptoms of a seizure, and described his conduct as irrational. The fact that Petitioner told Kaufman he was going to have a seizure supports rather than undermines the likelihood of a seizure; true seizures are generally preceded by an aura, or special feeling associated with a coming seizure. Although there was no testimony in this regard, the police report demonstrates that Petitioner was treated by paramedics at the scene of the arrest.

Petitioner was noted by Holy Cross hospital staff, where he was taken pre-booking, to be "combative and uncooperative," but the treating physician offered a diagnosis of seizure history, noted prescriptions for phenobarbital and Mysoline, and ordered that Petitioner be observed while at the local jail.

f . Mental Disturbance: Conclusion Re Three Aggravating Incidents and Epilepsy

Petitioner's neurological examination and treatment records document a clear and active clinical history of epilepsy. Epilepsy is essentially an electric irritation likely caused by brain scarring. In petitioner's case, his premature birth, or the serious head injuries he suffered as a toddler, could have caused brain scarring that would lead to seizures. The three incidents described above within a few weeks of one another and other seizures reported by family members that did not result in arrest or hospitalization, when considered with the health history described above that included hyperactivity as a child, an abnormal EEG and treatment for epilepsy at nine years old, demonstrate a recurring pattern of seizures. There is not enough evidence to

say for certain that the episodes introduced by the prosecution were not staged, but there is substantial and credible evidence that they were not, and that the incidents were in significant part the product of petitioner's seizure disorder.

g. Mental Disturbance: The Commitment Offense

Petitioner has a lengthy and readily available history of organic and seizure disorders. On the night of the crime, several witnesses, both for the prosecution and defense, testified that Mr. Pinholster had consumed huge amount of alcohol, including a home-made brew, and smoked substantial amounts of marijuana. His behavior included grandiose and threatening declarations that he was sent by God, and an explosive "crazy" reaction when cornered by the victims while attempting to flee the scene of a burglary. These facts (Scott's grandiosity at Tapar's house, his. intoxication, his explosive reaction to being trapped), seen in the context of Scott's mental health history, indicate that the crime was committed while under the influence of extreme mental or emotional disturbance. Petitioner was substantially impaired by a bipolar mood disorder operating synergistically with intoxication and a seizure disorder at the time the crime was committed. While these facts do not suffice to provide Scott with a legal defense to his actions, given that the burglary was the result of sporadic planning over a period of weeks, they are extenuating circumstances in any attempt to determine his moral culpability.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on June 5, 2001, at Santa Monica, California

[Signature]
JOHN M. STALBERG, M.D.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SCOTT LYNN PINHOLSTER,	) NO. CV
	) 95-6240-GLT
Petitioner,	)
	) [DEATH
	) PENALTY CASE]
v.	)
	) DECLARATION
JEANNE WOODFORD,	) OF JOHN M.
Warden of the	) STALBERG, M.D.
	)
Respondent.	)
	)

I, JOHN. M. STALBERG, M.D., declare and state as follows:

1. I am a physician in Santa Monica, California. I am licensed to practice medicine by the California Board of Medical Examiners. I have personal knowledge of the facts set forth herein, and would testify competently to the same if called upon to do so.

2. I received my medical training at the State University of New York, Downstate Medical Center, and obtained my M.D. in 1971. I was an intern at Los Angeles County/University of Southern California ("LAC/USC") Medical Center in 1971 and 1972, and was a psychiatric resident at the same hospital from 1972 through 1975. I have been licensed to practice medicine in California continuously since 1972. Since 1976, I have been board-certified as a psychiatrist by the American Board of Psychiatry and Neurology. In 1980, I receive a diplomate from American Board of Forensic Psychiatry. I have qualified as an expert in psychiatry in numerous cases in federal and California state courts, and have extensive experience conducting psychiatric examinations of criminal defendants and rendering opinions on psychiatric issues in criminal cases. A true and correct copy of my curriculum vitae, detailing my professional training, qualifications, and experience, is attached hereto as Exhibit 239.

3. On March 11, 1984, I examined Petitioner Scott Pinholster at the Los Angeles County Jail, pursuant to an order from Los Angeles County

Superior Court judge Daniel Kaufman. Petitioner was charged with two counts of murder, and special circumstances were alleged by the prosecution. I also reviewed some documents pertaining to the case, including some police reports, a probation report prepared in 1978. These materials were furnished to me by one of Mr. Pinholster's trial attorneys, Wilbur G. Dettmar. I may have also reviewed some medical records on Mr. Pinholster from the Los Angeles County Jail.

4. On March 14, 1984, I wrote a letter to Mr. Dettmar which contained my conclusions regarding Mr. Pinholster's mental state at the time of the offenses, and regarding the existence of mitigating circumstances as defined in California Penal Code section 190.3. These conclusions were based on my examination of Mr. Pinholster and my review of the materials which Mr. Dettmar furnished to me. I concluded that Mr. Pinholster suffered from no mental disturbance at the time of the offense or at the time of the interview that had any legal significance. I also wrote that I could see nothing by way of mitigating evidence. I further opined that the operative psychiatric diagnosis for Mr. Pinholster was one of Antisocial Personality Disorder. A true and correct copy of my letter of March 14, 1984 is attached hereto as Exhibit 209. The definition of Antisocial Personality Disorder in effect at that time appeared in the American Psychiatric Association's Diagnostic and Statistical Manual (3d edition, 1980) (the "DSM-III"), which was used by psychiatrists at that time to classify and diagnose the various psychiatric and personality disorders identified by the profession. A true and correct copy of selected excerpts of the DSM-III, "including its definition of

"Antisocial Personality Disorder", is attached hereto as Exhibit 240.

5. In April 1997, I was contacted by Michael Abzug, one of the attorneys who was then representing Mr. Pinholster in his federal habeas corpus action. Mr. Abzug asked me to review additional materials to determine how these additional materials might affect or change the opinions I expressed in 1984. I agreed to do so. Between April 1997 and June 2001, at Mr. Abzug's request, I reviewed a large volume of additional materials pertaining to Mr. Pinholster and his family, including the following:

a. Hospital and medical records pertaining to Mr. Pinholster's medical history, including his March 1968 EEG examination and diagnosis of epilepsy; his treatments with anti-seizure medication beginning in approximately 1979; his hospitalization at Holy Cross Hospital in August 1980 for heroin-related heart problems; his hospitalization at the U.S.C. Medical Facility in August 1981 following a reported epileptic seizure; his hospitalization at Holy Cross Hospital the same month for another reported seizure; and his referral to Pacoima Memorial Hospital in September 1981 for seizure disorder;

b. School records pertaining to Mr. Pinholster from the Los Angeles Unified School District;

c. Records from Camarillo State Hospital pertaining to Mr. Pinholster's stay at that facility in 1970, when he was eleven years old;

d. Police reports of two past incidents in

August 1981 in which Mr. Pinholster physically assaulted police officers and resisted arrest;

e. Documents pertaining to mental health problems afflicting, and/or criminal behavior exhibited by, several of Mr. Pinholster's relatives, including his biological father, Garland Pinholster; his brothers, Alvin and Terry Pinholster; his half-sister, Tammy Brashear; and his half-brother, Guy Pinholster;

f. Declarations by several members of Mr. Pinholster's family, including his mother, Burnice Brashear; his stepmother, Joyce Pinholster Anderson; his maternal aunt, Lois Fosberg; Tammy Brashear; and Terry Pinholster;

g. A declaration by one of Mr. Pinholster's elementary school teachers, Lois Rainwater;

h. Portions of the transcript from the guilt phase of Mr. Pinholster's trial, including those containing testimony by Art Corona and Lisa Tapar about the events surrounding and leading up to the double murder;

i. The entire transcript from the penalty phase of Mr. Pinholster's trial, including the portions containing Burnice Brashear's testimony about his early childhood head injuries and other matters;

j. A declaration by George Woods, M.D., dated November 9, 1993, in which Dr. Woods opined -- incorrectly, in my view – that Petitioner suffered from Bipolar Disorder.

6. I also spoke by telephone to several of Mr. Pinholster's family members, including Burnice Brashear, Tammy Brashear, Lois Fosberg, Sterling Fosberg (Lois Fosberg's husband), about their recollections of Mr. Pinholster's childhood and adolescence.

7. As a result of these conversations, and my review of the additional materials provided to me by Mr. Abzug and his colleagues, I had more information and data about Mr. Pinholster's mental state and about the existence of potentially mitigating factors than I had had in March 1984. At the request of Mr. Abzug, I prepared and signed a series of declarations, dated April 19, 21 1997; January 24, 2000; and June 5, 2001, setting forth my opinions based on the additional materials I reviewed. It was my understanding that Mr. Abzug intended to call me as a witness to testify at the evidentiary hearing in this case. I was prepared to testify to the matters set forth in the three declarations.

8. On July 11, 2001, and July 21, 2001, pursuant to an agreement between Mr. Pinholster's counsel and the state Attorney General's Office, I sat for an oral deposition taken by the latter. During the course of that deposition, I was shown copies of my letter of March 14, 1984; my declarations of April 19, 1997 and June 5, 2001; and a few other documents. I was questioned at length by Deputy Attorney General Richard Moskowitz, who represented the Warden of San Quentin State Prison, about what my opinions would have been in 1984 if I had had access to the additional materials given to me by Mr. Pinholster's lawyers in 1997 and later. I was also

asked by Messrs. Moskowitz and Abzug about the bases for the opinions I had previously expressed. In addition, I was asked to elaborate on various aspects of my opinions, and to express my opinions about certain separate but related issues pertaining to Mr. Pinholster's mental health.

9. As set forth in my declarations of April 19, 1997; January 24, 2000; and June 5, 2001, the additional documents I have reviewed since 1997 did contain some information that might conceivably be mitigating within the very broad definition of California Penal Code section 190.3(k). On the other hand, as I testified at my deposition in July 2001, the additional materials I reviewed did not alter my conclusion that Mr. Pinholster suffers from Antisocial Personality Disorder, as that term is defined in the DSM-III.

10. Several weeks after the deposition was completed, I received originals of the deposition transcripts and reviewed them for accuracy. I made a few minor, non-substantive corrections to the transcripts, and made notations to indicate the changes. I thereafter signed witness's certificates, which *were* attached to the transcripts, in which I affirmed that "I have read the foregoing deposition and having made such changes and corrections as I desire, I certify that, the same is true of my own knowledge, except as to those matters stated upon my information and belief, and as to those matters, I believe it to be true."

11. On or about May 9, 2002, I received a letter from Mr. Pinholster's current counsel advising that they would not call me as a witness at the

evidentiary hearing in the case, that they no longer considered me their expert. The letter added that I was free to consult with, and execute a declaration for, the Attorney General's Office. A true and correct copy of that letter is attached hereto as Exhibit 242.

12. At the request of Mr. Moskowitz, I have since re-reviewed the deposition transcripts and my file on the case. At my request, Mr. Moskowitz also sent me a declaration executed by the Attorney General's designated expert, F. David Rudnick, M.D.; a report written by Dr. Rudnick summarizing what he found out during his mental examination of Mr. Pinholster in June 2002; and reports by Mr. Pinholster's two experts, Sophia Vinogradov, M.D., and Donald Olson, M.D. The Attorney General's Office has agreed to compensate me for the time I spend reviewing documents and testifying in Court. My billing rate is $175 per hour, which is the same rate I charged Mr. Pinholster's attorneys for my time prior to my deposition. For depositions, I charge portal-to-portal at an hourly rate of $350, which is what I billed the state Attorney General's Office for my time on my earlier deposition in this case.

13. Having reviewed the deposition transcripts and my files, I stand by my deposition testimony. To the extent that I testified about factual matters at my deposition, my testimony was true at the time and is still true today. To the extent that I testified to my professional opinions of Mr. Pinholster during the deposition, my testimony accurately set forth the opinions I held at the time, and I still hold those opinions today. I read the reports of Drs. Rudnick, Olson, and Vinogradov. They do not alter my opinions.

14. At Mr. Moskowitz's request, I have agreed to appear in court the week of September 10, 2002, for the purpose of enabling Mr. Pinholster's current counsel to cross-examine me about my opinions concerning the mental status of his client.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct, except as to those matters stated on information and belief. As to those matters, I believe them to be true.

Executed this 29 day of August, 2002, in Santa Monica, California.

[Signature]
JOHN M. STALBERG, M.D.

DIPLOMATE, AMERICAN BOARD OF PSYCHIATRY AND NEUROLOGY

DIPLOMATE, AMERICAN BOARD OF FORENSIC PSYCHIATRY

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March 14, 1984

Wilbur G. Dettmar, Esq.
15915 Ventura Blvd., #301
Encino, CA 91436

Re: Scott Pinholster
Case No. A 800733

Dear Mr. Dettmar:

Pursuant to Judge Dan Kaufmann's court order under 987.9 PC, I examined the above defendant on 3-11-84 at County Jail. Material reviewed included police report of this case, and Probation report from 1978.

The defendant is charged with robbery and 2 counts of murder.

The issues are past mental state as well as mitigation, if the special circumstances are found to be true.

OPINIONS

1. When examined, Mr. Pinholster did not manifest any significant signs or symptoms of mental disorder or defect other than his antisocial personality disorder by history. Although he allegedly has epilepsy, he has not been taking medication for the past year at County Jail and has not had a seizure.

Additionally, it does not appear he suffers brain damage as he was cognitively intact on mental status examination.

He has a history of hyperactivity as a youngster and hospitalization at Camarillo State Hospital at the age of 14 for incorrigibility. He was not medicated there and just received 90 day observation. He spent time in the Youth Authority and in various state prisons without requiring psychiatric treatment or medication.

He has a lengthy history of drug dependency of the narcotic variety, but his drug dependency has not resulted in any brain damage.

2. As for the alleged offenses, the defendant denies any involvement other than directing an individual to burglarize the residence with Mr. Pinholster collecting 1/3 of the money from sale of the stolen loot. He is able to describe his actions on the night in question in great detail, omitting of course any direct involvement with the victims. It would not appear therefore he was significantly intoxicated or impaired on the night in question.

Additionally, considering the statements attributed to the defendant by witnesses, it would also appear he was fully aware of what he was doing at the time of the offenses. He allegedly stated, "I'll take care of finding out where the dope is. I'll handle Kumar." This was some days before the offenses occurred.

On the night of the offense Mr. Pinholster apparently planned his robbery and was aware of what he was doing. This is by inference as he did not provide any subjective information other than his directing an individual to burglarize Kumar's home.

3. As for mitigation, it does not appear Mr. Pinholster's epilepsy, hyperactivity as a child, or incorrigibility were related to the offenses except the incorrigibility reflects upon his psychopathic personality traits. He was not under the influence of extreme mental or emotional disturbance, nor did he have impaired ability to appreciate the criminality or conform his conduct to the requirements of the law.

Also, because of Mr. Pinholster's personality disorder it is likely he would be recalcitrant and a security problem while in custody.

Sincerely,

[Signature]
JOHN M. STALBERG, M.D.
Diplomate, American Board of Psychiatry and Neurology
Diplomate, American Board of Forensic Psychiatry

JMS/vs

JOHN MACDONALD STALBERG, M.D., J.D.
Diplomate American Board of Psychiatry
and Neurology
Diplomate American Board of Forensic
Psychiatry

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Education

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State University of New York, Downstate Medical Center, M.D. degree, June 1971
Rotating Internship, LAC/USC Medical Center, 1971-1972
Psychiatry Residency, LAC/USC Medical Center, 1972-1975 ,
Fellowship in Psychiatry and Law, USC Institute of Psychiatry, Law and Behavioral Science, July 1975-June 1976
University of West Los Angeles School of Law, Juris Doctor (J.D.) May, 1999.

Licensure

California Board of Medical Examiners, G-23091, 1972 - present
Connecticut Board of Medical Examiners, No. 17523, 1976-1980
New York State Board of Medical Examiners, No. 25412, 1976-1980
Diplomate, National Board of Medical Examiners,

1972

Diplomate, American Board of Psychiatry and Neurology, 1976

Diplomate, American Board of Forensic Psychiatry, 1980

Professional Background

Staff Psychiatrist, Los Angeles County Department of Health, Santa Monica West, Mental Health Service, 1976-1978

Staff Psychiatrist, Metropolitan State Hospital, 1974-1977

Physician, Los Angeles County Probation Department Central Juvenile Hall, 1973-1976

Member, Medical Staff, St. John's Hospital, Santa Monica, California 1976-1993

Member, Medical Staff, Brotman Memorial Hospital, Culver City, California 1976-1978

Teaching Responsibilities:

Clinical Supervision of 2nd year Psychiatry Residents in cases involving psychiatric-legal issues and problems.

Hypnosis preceptor, USC Medical students at St. John's Hospital, 1974-1975

Administrative Responsibilities:

Interviewing candidates for Psychiatry Residency Program

Administrative Assistant to Ward Chief, Los Angeles County/USC Medical Center, Department of Psychiatry, 1974-1975

Secretary, Psychiatry Committee, St. John's Hospital & Health Center, 1977-1980

University Appointment

University of Southern California School of Medicine,

Instructor, USC Institute of Psychiatry, Law and Behavioral Science, Department of Psychiatry, 1976-1984

Society Memberships

American Academy of Psychiatry and the Law
American Psychiatric Association
American Society of Clinical Hypnosis
California Society of Industrial Medicine and Surgery

Consultantships

Member, U.S. District Court Psychiatric Panel, 1977 - present
Member, Los Angeles Superior Court Psychiatric Panel, 1977 - present
Member, Los Angeles County Juvenile Court Psychiatric Panel, 1977-1982
Independent Medical Examiner, Division of Industrial Accidents, 1977 - present
Consulting Psychiatrist, Southern Reception Center and Clinic, California Youth Authority, January 1975 - July 1976
Consulting Psychiatrist, Terminal Island Federal Correctional Institution, July 1975 - March 1976
Qualified Medical Examiner, Appointed 1990 present
Certified QME by the Industrial Medical Council, June 29, 1994

Clinical Experience

- Treated thousands of psychiatric inpatients and outpatients.
- Examined thousands of criminal defendants in various penal facilities statewide and in

Arizona.

- Testified thousands of times in all sorts of court proceedings in most counties of California.
- Qualified as an expert in juvenile psychiatry, personal injury, probate, family law, competency, insanity, sexual psychopathy, drug/alcohol abuse, workers' compensation, medical malpractice, fitness for duty, longterm disability and all other psychiatric forensic issues.
- Selected as Agreed Medical Evaluator in great majority of my workers' compensation cases.
- Qualified as a psychiatric expert and testified at the Old Bailey in London, England, 1997.

[LOGO]

DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS

(THIRD EDITION)

* * *

Prevalence. This disorder appears to be more common recently than in the past, although this may only be due to greater professional interest in the category.

Predisposing factors, sex ratio, and familial pattern. No information.

Differential diagnosis. Borderline and Histrionic Personality Disorders are often also present; in such instances, multiple diagnoses should be given.

Diagnostic criteria for Narcissistic Personality Disorder

The following are characteristic of the individual's current and long-term functioning, are not limited to episodes of illness, and cause either significant impairment in social or occupational functioning or subjective distress:

A. Grandiose sense of self-importance or uniqueness, e.g., exaggeration of achievements and talents focus on the special nature of one's problems.

B. Preoccupation with fantasies of unlimited success, power, brilliance, beauty, or ideal love.

C. Exhibitionism: the person requires constant attention and admiration.

D. Cool indifference or marked feelings of rage, inferiority, shame, humiliation, or emptiness in response to criticism, indifference of others, or defeat.

E. At least two of the following characteristic of disturbances in interpersonal relationships:

(1) entitlement: expectation of special favors without assuming reciprocal responsibilities,

e.g., surprise and anger that people will not do what is wanted
(2) interpersonal exploitativeness: taking advantage of others to indulge own desires or for self-aggrandizement; disregard for the personal integrity and rights of others
(3) relationships that characteristically alternate between the extremes of overidealization and devaluation
(4) lack of empathy: inability to recognize how others feel, e.g., unable to. appreciate the distress of someone who is seriously ill.

301.70 Antisocial Personality Disorder

The essential feature is a Personality Disorder (p. 305) in which there are a history of continuous and chronic antisocial behavior in which the rights of others are violated, persistence into adult life of a pattern of antisocial behavior that began before the age of 15, and failure to sustain good job performance over a period of several years (although this may not be evident in individuals who are self-employed or who have not been in a position to demonstrate this feature, e.g., students or housewives). The antisocial behavior is not due to either severe Mental Retardation, Schizophrenia, or manic episodes.

Lying, stealing, fighting, truancy, and resisting authority are typical early childhood signs. In adolescence, unusually early or aggressive sexual behavior, excessive drinking, and use of illicit drugs are frequent. In adulthood, these kinds of behavior continue, with the addition of inability to sustain consistent work performance or to function as a responsible parent and failure to accept social norms with respect to lawful behavior. After age 30 the more flagrant aspects may diminish, particularly sexual promiscuity, fighting, criminality, and vagrancy.

Associated features. Despite the stereotype of a normal mental status in this disorder, frequently·

there are signs of personal distress, including complaints of tension, inability to tolerate boredom, depression, and the conviction (often correct) that others are hostile toward them. The interpersonal difficulties and dysphoria tend to persist into late adult life even when the more flagrant antisocial behavior has diminished. Almost invariably there is markedly impaired capacity to sustain lasting, close, warm and responsible relationships with family, friends, or sexual partners.

Impairment. The disorder is often extremely incapacitating, resulting in failure to become: an independent, self-supporting adult and in many years of institutionalization, more commonly penal than medical. It is possible, however, for individuals who have some of the features of the disorder to achieve political and economic success; but these people virtually never present the full picture of the disorder, lacking in particular the early onset in childhood that usually interferes with educational achievement and prohibits most public careers.

Complications. Illiteracy and Substance Use Disorders are frequent complications.

Predisposing factors. Predisposing factors are Attention Deficit Disorder and Conduct Disorder during prepuberty. The absence of parental discipline apparently increases the likelihood that Conduct Disorder will develop into Antisocial Personality Disorder. Other predisposing factors include extreme poverty, removal from the home, and growing up without parental figures of both sexes.

Age at onset. By definition the disorder begins before the age of 15. Females' first symptoms usually begin in puberty, whereas males' are usually obvious in early childhood.

Sex ratio. The disorder is much more common in males than in females.

Prevalence. Estimates of the prevalence of Antisocial Personality Disorder for American men are about 3%, and for American women, less than 1%. The disorder is more common in lower-class populations, partly because it is associated with impaired earning capacity and partly because fathers of those with the disorder frequently have the disorder themselves, and consequently their children often grow up in impoverished homes.

Familial pattern. Antisocial Personality disorder is particularly common in the fathers of both males and females with the disorder. Studies attempting to separate genetic from environmental influences within the family suggest that both are important; since there seems to be inheritance from biological fathers separated from their offspring early in life and a social influence from adoptive fathers. Because of a tendency toward assortative mating, the children of women with Antisocial Personality Disorder who have the disorder themselves are likely to have both a mother and a father with the disorder.

Differential diagnosis. Conduct Disorder consists of the typical childhood signs of Antisocial Personality Disorder. Since such behavior may terminate spontaneously or evolve into other disorders such as Schizophrenia, a diagnosis of Antisocial Personality Disorder should not be made in children; it is reserved for adults (18 or over), who have had time to show the full longitudinal pattern.

Adult Antisocial Behavior, in the category Conditions Not Attributable to a Mental Disorder, should be considered when criminal or other aggressive or antisocial behavior occurs in individuals who do not meet the full criteria for Antisocial-Personality Disorder and whose antisocial behavior cannot be attributed to any other mental disorder.

When Substance Abuse and antisocial behavior begin in childhood and continue into adult

life, both Substance Use Disorder and Antisocial Personality Disorder should be diagnosed if the criteria for each disorder are met, regardless of the extent to which some of the antisocial behavior may be a consequence of the Substance Use, Disorder, e.g., illegal selling of drugs, or the assaultive behavior associated with Alcohol Intoxication. When antisocial behavior in an adult is associated with a Substance Use Disorder, the diagnosis of Antisocial Personality Disorder is not made unless the childhood signs of Antisocial Personality Disorder were .also present and continued without a remission of five years or more between age 15 and adult life.

Severe Mental Retardation and Schizophrenia preempt the diagnosis of Antisocial Personality Disorder, because at the present time there is no way to determine when antisocial behavior that occurs in an individual with severe Mental Retardation or Schizophrenia is due to these more severe disorders or to Antisocial Personality Disorder.

Manic episodes may be associated with antisocial behavior. The differential diagnosis is easily made by noting the absence of severe behavior problems in childhood and the sudden change in adult behavior.

Diagnostic criteria for Antisocial Personality Disorder

A. Current age at least 18.

B. Onset before age 15 as indicated by a history of three or more of the following before that age:

(1) truancy (positive if it amounted to at least five days per year for at least two years, not including the last year of school)
(2) expulsion or suspension from school for misbehavior
(3) delinquency (arrested or referred to juvenile court because of behavior)

(4) running away from home overnight at least twice while living in parental or parental surrogate home
(5) persistent lying
(6) repeated sexual intercourse in a casual relationship
(7) repeated drunkenness or substance abuse
(8) thefts
(9) vandalism
(10) school grades markedly below expectations in relation to estimated or known IQ (may have resulted in repealing a year)
(11) chronic violations of rules at home and or at school (other than truancy)
(12) initiation of fights

C. At least four of the following manifestations of the disorder since age 18:

(1) inability to sustain consistent work behavior, as indicated by any of the following: (a) too frequent job changes (e.g., three or more jobs in five years not accounted for by nature of job or economic or seasonal fluctuation), (b) significant unemployment (e.g., six months or more in five years when expected to work), (c) serious absenteeism from work (e,g., average three days or more of lateness or absence per month, (d) walking off several jobs without other jobs in sight (Note: similar behavior in an academic setting during the last few years of school may substitute for this criterion in individuals who by reason of their age or circumstances have not had an opportunity to demonstrate occupational adjustment)
(2) lack of ability to function as a responsible parent as evidenced by one or more of the following: (a) child's malnutrition, (b) child's illness resulting from lack of minimal hygiene standards, (c) failure to obtain medical care for a seriously ill child, (d) child's dependence on neighbors or nonresident relatives for food or shelter, (e) failure to arrange for a caretaker

for a child under six when parent is away from home, (f) repeated squandering, on personal items, of, money required for household necessities

(3) failure to accept social norms with respect to lawful behavior, as indicated by any of the following: repeated thefts, illegal occupation (pimping, prostitution, fencing, selling drugs), multiple arrests, a felony conviction

(4) inability to maintain enduring attachment to a sexual partner as indicated by two or more divorces and/or separations (whether legally married or not), desertion of spouse, promiscuity (ten or more sexual partners within one year)

(5) irritability and aggressiveness as indicated by repeated physical fights or assault (not required by one's job or to defend someone or oneself), including spouse or child beating

(6) failure to honor financial obligations, as indicated by repeated defaulting on debts, failure to provide child support, failure to support other dependents on a regular basis

(7) failure to plan ahead, or impulsivity, as indicated by traveling from place to place without a prearranged job or clear goal for the period of travel or clear idea about when the travel would terminate, or lack of a fixed address for a month or more

(8) disregard for the truth as indicated by repeated lying, use of aliases, "conning" others, for personal profit

(9) recklessness, as indicated by driving while intoxicated or recurrent speeding

D. A pattern of continuous' antisocial behavior in which the rights of others are violated, with no intervening period of at least five years without antisocial behavior between age 15 and the present time (except when the individual was bedridden or confined in a hospital or penal institution).

E. Antisocial behavior is not due to either Severe

Mental Retardation, Schizophrenia or manic episodes.

301.83 Borderline Personality Disorder
The essential feature is a Personality Disorder (p. 305) in which there is instability in a variety of areas, including interpersonal behavior, mood, and self-image. No single feature is invariably present. Interpersonal relations are often intense and unstable, with marked shifts of attitude over time. Frequently there is impulsive and unpredictable behavior that is potentially physically self-damaging. Mood is often unstable, with marked shifts from a normal mood to a dysphoric mood or with inappropriate, intense anger or lack of control of anger. A profound identity disturbance may be manifested by uncertainty about several issues relating to identity, such as self-image, gender identity, or longterm goals or values. There may be problems tolerating being alone, and chronic feelings of emptiness or boredom.

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May 9, 2002

John Stalberg, M.D.
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Los Angeles, CA 90403

Re: Scott Pinholster v.
Jeanne Woodford, Warden
Case No. CV 95-6240 GLT

The Federal Public Defender and Michael R. Snedeker, Esq. currently represent Mr. Scott Pinholster in the above-captioned case, which is pending in the U.S. District Court for the Central District of California. Mr. Michael Abzug, one of Mr. Pinholster's former counsel, retained you as Petitioner's expert in April of 1997. He is now an administrative law judge and no longer represents Mr. Pinholster.

We are writing to inform you that we no longer require your services, and that therefore you are no longer being retained as Petitioner's mental health expert. It is possible that the Respondent in this case, who is represented by the Attorney General of the State of California, will call you regarding Mr.

Pinholster. You are free, subject to any attorney-client or work-product privileges applicable to your prior retention in this matter, to speak with Respondent's attorneys, and they are free to retain you as an expert.

Sincerely,

[Signature]
Dean R. Gits

cc: Richard S. Moskowitz, Esq.
(Deputy Attorney General)
Michael R. Snedeker, Esq.

PETITIONER'S BRIEF

Supreme Court U.S.
AUG 09 2010
OFFICE OF THE CLERK

No. 09-1088

In The Supreme Court of the United States

VINCENT CULLEN, Acting Warden
of the California State Prison at San Quentin,

Petitioner,

v.

SCOTT LYNN PINHOLSTER,

Respondent.

**On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

BRIEF ON THE MERITS FOR PETITIONER

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether a federal court may reject a state-court adjudication of a petitioner's claim as "unreasonable" under 28 U.S.C. § 2254, and grant habeas corpus relief, based on a factual predicate for the claim that the petitioner could have presented to the state court but did not.

2. Whether a federal court may grant relief under 28 U.S.C. § 2254 on a claim that trial counsel in a capital case ineffectively failed to produce mitigating evidence of organic brain damage and a difficult childhood because counsel, who consulted with a psychiatrist who disclaimed any such diagnosis, as well as with the defendant and his mother, did not seek out a different psychiatrist and different family members.

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OPINIONS AND JUDGMENTS BELOW

The en banc opinion of the United States Court of Appeals for the Ninth Circuit, affirming the district court judgment granting habeas corpus relief, is reported as *Pinholster* v. *Ayers*, 590 F.3d 651 (9th Cir. 2009). The Ninth Circuit three-judge panel opinion, which had reversed the district court judgment, is reported as *Pinholster* v. *Ayers*, 525 F.3d 742 (9th Cir. 2008). The United States District Court decision, addendum to decision, and judgment granting habeas corpus relief, are unreported. The California Supreme Court orders summarily denying habeas corpus relief are unreported. The California Supreme Court opinion affirming respondent's conviction and sentence on appeal is reported as *People* v. *Pinholster*, 824 P.2d 571 (Cal. 1992). Each is reproduced in the appendix to the petition for writ of certiorari (PA).

JURISDICTION

The petition for writ of certiorari was filed on March 9, 2010, and was granted on June 14, 2010. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Sixth Amendment provides, in relevant part: "In all criminal prosecutions, the accused shall

enjoy the right . . . to have the Assistance of Counsel for his defence."

2. Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—[¶] (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or [¶] (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. [¶] (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the

> applicant shows that—[¶] (A) the claim relies on—[¶] (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or [¶] (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and [¶] (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

A. The State Criminal Proceedings

1. Respondent was charged with the capital murders of Thomas Johnson and Robert Beckett. The evidence adduced by the prosecution at the guilt phase of the trial proved that, early in the morning on January 9, 1982, Johnson and Beckett, house-sitters for a marijuana dealer named Michael Kumar, returned to Kumar's house only to find that the house was being burglarized by Art Corona, Paul David Brown, and respondent. Reporter's Transcript in Los Angeles County Superior Court case no. A800733, district court docket (dkt.) no. 49, lodgment A.6 (Trial RT), vol. 35 at 4897, 4902, 4909, 4914-36.

Johnson went around the house to the back door, where he encountered Corona, followed by respondent

and Brown, fleeing the crime scene. As Johnson backed away, respondent stabbed him in the chest, saying such things as "Give up your dope, your money." Johnson took out his wallet and dropped it to the ground. Respondent ordered Johnson to sit down; Johnson complied. Trial RT, vol. 35 at 4937, 4939, 4945-46, 5009; vol. 35, at 5063-65.

Beckett came running from a side gate, screaming. Trial RT, vol. 35 at 4940, 5065-66. Respondent stabbed him and forced him to lie face down. Respondent demanded, "Where is your fucking money? Give it up. . . . Where is all the dope?" Beckett simply grunted. Respondent picked up the wallet Johnson had dropped, and took Beckett's wallet too. Trial RT, vol. 35 at 4946. Respondent stood over Beckett and kicked him repeatedly in the head. Trial RT, vol. 35 at 4934, 4942-44. Beckett suffered three stab wounds: one fatal chest wound, another wound to his hip, and a third wound to his leg. Trial RT, vol. 40 at 5669-73.

As respondent was stabbing Beckett, Brown squatted next to Johnson, clenched his knife in his fist as one would hold an ice pick, and plunged the knife into Johnson's upper chest. Trial RT, vol. 35 at 4994, 5014-16. Johnson suffered three stab wounds in all: two fatal wounds to his chest, and one to his back. Trial RT, vol. 40 at 5675.

Respondent, Brown, and Corona fled the scene and drove to respondent's apartment. On the way there, Brown and respondent made statements such

as, "We did it, we got 'em man, we got 'em good"; and Brown boasted that he had "buried the knife to the hilt" in Johnson. Trial RT, vol. 35 at 4946-47. At the apartment, respondent cleaned his knife in the kitchen sink, saying, "It had to be done the way it was done. We had to do what we had to do." Trial RT, vol. 35 at 4949-51; vol. 37 at 5247. Respondent then divided up equally some marijuana taken during the burglary and $23 from Beckett and Johnson's wallets. Trial RT, vol. 35 at 4953.

The prosecution evidence also proved that in May 1981 respondent and another man had entered the home of drug dealer Todd Croutch, and robbed Croutch and his family at gun point. PA 306.

Testifying in his own defense, respondent admitted that he had committed the Croutch robbery, that he had burglarized Kumar's home earlier on the evening of the homicides, and that he had given Corona directions to Kumar's home. But respondent insisted that he was elsewhere at the time of the Johnson and Beckett homicides. Respondent asserted that he had committed "hundreds" of robberies, but that he victimized only drug dealers and that he only used guns rather than knives. PA 305-15.

The jury found respondent guilty as charged. PA 304-05.

2. At the penalty phase of the trial, the prosecution relied upon the circumstances of the murders, and also produced further aggravating evidence. That evidence showed that respondent

earlier had been convicted of kidnapping; that he had been involved in gangs as a juvenile; that he had twice resisted arrest; that he had once broken his wife's jaw; and that, while in prison, he had assaulted inmates, provoked a racial fight, and threatened to kill a guard and a prosecution witness. PA 316-18.

In preparing for the penalty phase, defense counsel retained psychiatrist John Stalberg. After examining respondent, Dr. Stalberg sent a written evaluation to counsel. Dr. Stalberg reported that a mental examination indicated that respondent was cognitively intact and that he showed no sign of brain damage or any significant signs or symptoms of any other mental disorder or defect—other than antisocial personality disorder. Although noting allegations that respondent had epilepsy, the doctor further reported that, even though respondent had not been taking any medication, he had suffered no seizures while in county jail over the course of the previous year. JA 129-32.

In addition, based on respondent's ability to describe his actions on the night in question in great detail, Dr. Stalberg reported that respondent did not appear to have been significantly intoxicated or impaired at the time of the charged crimes. JA 130-31. Concluding from police reports and statements attributed to respondent in those reports that respondent had planned the robbery in the days leading up to the offenses, Dr. Stalberg also reported to counsel that respondent appeared to have been fully aware of what he was doing at the time of the offenses. JA 131.

Dr. Stalberg's written evaluation noted that respondent had a history of hyperactivity as a child and that he had been hospitalized for incorrigibility at a state hospital at the age of 14. However, Dr. Stalberg reported, respondent had not been medicated during his stay and had been released after a 90-day observation. Further, respondent thereafter had spent time in the California Youth Authority and various state prisons without requiring psychiatric treatment or medication. JA 130-31.

Addressing potential mitigating factors, Dr. Stalberg concluded that it did not appear that respondent's epilepsy, his hyperactivity as a child, or his incorrigibility related to the charged offenses—except to the extent that the incorrigibility reflected respondent's psychopathic personality traits. Finally, Dr. Stalberg reported his opinion that, because of respondent's antisocial personality disorder, it was likely that he would be recalcitrant and a security problem while in custody. JA 131-32.

Defense counsel did not call Dr. Stalberg as a witness. Rather, the defense called respondent's mother, Burnice Brashear. She testified that, although respondent grew up in a home free of material deprivation, respondent's stepfather sometimes disciplined respondent as a child to the point of abuse. She also described several accidents respondent had as a child, and the onset of his epilepsy at age 18. And she described respondent's

behavior as a child and a young man as reflecting a lack of respect for authority or the rights of others. PA 319.

The jury returned a verdict of death. PA 305. The California Supreme Court affirmed the conviction and sentence on direct review. PA 304-433.

B. Habeas Corpus Proceedings

1. The First State Habeas Petition

Respondent then filed a petition for writ of habeas corpus in the California Supreme Court, claiming among other things that trial counsel had failed to competently investigate and present mitigating evidence at the penalty phase of his trial. He also claimed that Dr. Stalberg "perfunctorily, unreasonably and incompetently failed to adequately investigate, recognize, or consider evidence of [respondent's] significant mental health impairments." RA 111. In support, respondent presented a declaration from Dr. George Woods that contained diagnoses different from those made by Dr. Stalberg. Dr. Woods diagnosed respondent as suffering from a psychotic form of bipolar disorder and opined that, at the time of his crimes, respondent was in the throes of a partial complex epileptic seizure. Respondent further claimed that defense counsel was incompetent in failing to interview and present testimony from other family members who, contrary to the testimony of respondent's mother, would have described respondent's childhood as being marked by substantial

deprivation and abuse. Respondent's Appendix for Opposition to the Petition for Writ of Certiorari (RA) 148-71.

Respondent argued that the omission of Dr. Woods's diagnoses and the alternative version of respondent's upbringing "unquestionably altered the outcome during both guilt and penalty phases of trial." RA 171. Under state procedures calling for the court to provisionally assume the truth of the factual allegations in the petition, the California Supreme Court summarily denied respondent's petition on the merits as failing to make out a prima facie case for relief. PA 302-03.

2. The First Federal Habeas Petition

Respondent next filed a federal habeas corpus petition, again claiming ineffective assistance of counsel in the investigation and presentation of mitigating evidence. JA 149-84. And, again, respondent presented Dr. Woods's diagnoses of bipolar mood disorder with psychotic features and seizure disorder. JA 183. Respondent also reiterated that his trial counsel should have investigated and presented alternative family-background witnesses. JA 172-82.

In addition, respondent raised a new claim that he had not presented in state court: that trial counsel had incompetently "prepared" Dr. Stalberg. Respondent relied on Dr. Stalberg's declaration that, had he known of new and "voluminous mitigating evidence" regarding respondent's life and family history given

to him years after the trial by habeas counsel, he would have examined respondent more thoroughly for neurological and physical dysfunction.[1] Dr. Stalberg's declaration, however, offered no diagnosis of respondent different from the one he had offered to trial counsel before the penalty phase of respondent's trial. JA 218-39.

Respondent stipulated that he had never presented this new claim to the state court. Dkt. no. 59. The district court permitted respondent to withdraw the "unexhausted" portions of the petition, and stayed the proceedings to give respondent a chance to return to state court and exhaust any state remedies. Dkt. no. 60.

3. The Second State Habeas Petition

Respondent filed a second state petition claiming, as in the first state petition, that he suffered from bipolar mood disorder with psychotic features and seizure disorder, and that Dr. Stalberg had performed incompetently. Respondent also claimed that trial counsel had performed deficiently in failing to "prepare" Dr. Stalberg. In support of this petition, respondent presented the same declaration of Dr. Stalberg that he had presented to the federal court.

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[1] Although respondent relied on Dr. Stalberg in support of this claim in his federal petition, he also continued to press his claim that Dr. Stalberg provided incompetent assistance at the time of trial. JA 161-69.

RA 65-147. The California Supreme Court summarily denied this petition on the merits. PA 300-01.

4. The Amended Federal Habeas Petition

Respondent returned to federal court, amending his petition to again present his now-exhausted claim that counsel was ineffective in failing to prepare Dr. Stalberg, supported by the same declaration from Dr. Stalberg that offered no new diagnosis of respondent. RA 1-64. Respondent requested an evidentiary hearing. Dkt. no. 106. The State argued that no evidentiary hearing was necessary because the California Supreme Court's reasonable adjudication of respondent's claims precluded relief under 28 U.S.C. § 2254(d)(1), and that, in any event, an evidentiary hearing was unauthorized under § 2254(e)(2). Dkt. no. 118. Deeming AEDPA inapplicable to respondent's case, the district court granted the evidentiary hearing on respondent's claim that trial counsel had failed to investigate and present mitigating evidence. Dkt. no. 144.

At a deposition just before the evidentiary hearing, however, Dr. Stalberg revealed that nothing in the new material he had reviewed called into question his original diagnosis that respondent was simply a psychopath. See Dkt. no. 202 at 6. Following this revelation, respondent's lead counsel quit the case. Dkt. no. 171.

New lawyers were appointed for respondent. They jettisoned Dr. Stalberg and found two new

experts, Drs. Sophia Vinogradov and Donald Olson, who came up with yet another theory regarding respondent's mental state: that respondent's childhood accidents resulted in brain damage leading to "personality change, aggressive type," so that, at the time of the crimes, respondent "flew into a murderous rage" that led him to stab his victims without realizing what he was doing. RA 172-75, 176-217. The State objected—unsuccessfully—that the new experts and their new opinions had no place in the federal proceedings because respondent had never presented them in state court. Dkt no. 192 at 1-6; Dkt. no. 207 at 3 n.1.

Reviewing the claim de novo under Ninth Circuit case authority, the district court granted relief. In the district court's view, counsel prejudicially erred in failing to adduce the evidence of the organic-brain-damage diagnosis and the testimony from different family members that respondent had grown up under conditions of deprivation and abuse. PA 261-99.

C. The Ninth Circuit Opinions

1. A three-judge Ninth Circuit panel reversed. PA 164-253. Applying the AEDPA-amended § 2254(d)(1), as required by *Woodford* v. *Garceau*, 538 U.S. 202 (2003), Judge Tallman's majority opinion concluded that the California Supreme Court's decision was reasonable, and thus precluded relief. In the panel's view, there was no reasonable likelihood that respondent was prejudiced by the omission of the

opinions of Drs. Vinogradov and Olson offered at the federal evidentiary hearing. Of particular significance to the panel's prejudice analysis was respondent's smirking and gloating testimony describing his lifelong violent criminality. PA 164-222. Chief Judge Kozinski, concurring, further concluded that counsel's performance at the penalty phase of respondent's trial had not been deficient. PA 222-26. Judge Fisher dissented. PA 226-53.

2. The Ninth Circuit granted en banc review and, in an 8-3 decision authored by Judge Smith, affirmed the district court's determination that trial counsel had provided ineffective representation at the penalty phase of respondent's trial. PA 1-70. The majority first issued a series of rulings on AEDPA procedures. The majority held that "Congress did not intend to restrict inquiry under § 2254(d)(1) only to evidence introduced in the state habeas court, or to have federal courts imply any such restriction." PA 29. The majority next held that the right to a federal evidentiary hearing is not tied "to a prior determination that the state habeas court unreasonably applied Supreme Court law to the record before it," and that, accordingly, the federal court may consider new facts proven at a federal evidentiary hearing even if the federal court has not otherwise concluded that the state habeas court decision involved an unreasonable application of Supreme Court law. PA 30. The majority further held that, under § 2254(e)(2), respondent was entitled to present, and the federal court was entitled to consider, evidence in

support of new factual allegations never asserted in state court because he had been denied an evidentiary hearing in state court on the same basic claim of "mitigation ineffective assistance. . . ." PA 34. Given these rulings on AEDPA procedure, the majority considered respondent's claim in light of new facts respondent presented only in federal court.

Next, in identifying the law applicable to the facts, the Ninth Circuit treated its interpretation of the 1982 Supplement to the American Bar Association Standards for Criminal Justice as the "prevailing professional norm" for the defense of death penalty cases in Los Angeles in 1984. PA 36-38. More specifically, the Ninth Circuit interpreted the standards to require counsel to investigate and present evidence "humanizing" the defendant. PA 47, 49, 53-54. Here, that obliged trial counsel to investigate, discover, and present evidence from the new experts that respondent had organic brain damage, and to investigate, discover, and present evidence from other family members who would have testified that respondent's childhood was marked by deprivation and abuse.

The Ninth Circuit concluded that trial counsel failed to meet the standard of care, notwithstanding that trial counsel had investigated respondent's family life and background and had consulted with a psychiatrist. PA 35-47. Further, the Ninth Circuit held that there was a reasonable probability that respondent would have received a more favorable

determination if trial counsel had presented such evidence. PA 47-68. Without further explanation, the Ninth Circuit concluded that the California Supreme Court's failure to grant relief was "unreasonable." PA 68-69.

In dissent, Chief Judge Kozinski rejected the majority's reliance on new facts presented in federal court as a basis for rejecting the California Supreme Court's decision under § 2254(d)(1). PA 70-163. As he explained, "It makes no sense to say that a state court unreasonably applied clearly established Supreme Court law to facts it didn't know existed. The state court might well have ruled differently had petitioner presented different facts." PA 79. The dissent further opined that the majority's reliance on the general 1982 ABA standards as laying down specific obligations on trial counsel in respondent's case was irreconcilable with this Court's recent decisions in *Bobby* v. *Van Hook*, 130 S. Ct. 13, 16-17 (2009), and *Wong* v. *Belmontes*, 130 S. Ct. 383 (2009). PA 88, 98. The dissent also criticized the majority for failing to show any deference to the California Supreme Court's adjudication of the case; and it set out in detail why rejection of respondent's claim, as presented to the state court, was reasonable. PA 123-62. The dissent found that the facts alleged to the California Supreme Court supported the conclusion that trial counsel reasonably investigated the available mitigating mental-health and family-background evidence, PA 126-31, and that respondent was not

prejudiced by trial counsel's purported shortcomings, PA 132-62.

SUMMARY OF ARGUMENT

I.

A. The Ninth Circuit was wrong to grant respondent habeas corpus relief on his ineffective assistance of counsel claim based on facts—most crucially new medical diagnoses of mental disorders—that respondent presented for the first time in an evidentiary hearing in federal court. A federal habeas corpus court may not consider, as a basis for rejecting the state court's adjudication of a prisoner's claim as "unreasonable" so as to open the door to relief under 28 U.S.C. § 2254(d)(1), facts the prisoner withheld from the state court. The plain language of § 2254(d)(1) demonstrates that its standard of deferential review is retrospective and contextual, asking if the state court's decision was reasonable in light of the claim as it was presented to the state court.

Further, Congress' overarching purpose in enacting this cornerstone AEDPA reform of habeas corpus—channeling a prisoner's claims to the state court as the court with primary responsibility for resolving them, and then treating the resulting state-court decision with great deference—would be frustrated if a prisoner were allowed to play "bait and switch" by relying in federal court on crucial new

facts withheld from the state court. Consistent with other areas of the law where review for "reasonableness" considers the decisionmaker's judgment only in context, and as Chief Judge Kozinski recognized in his dissent in this case, "It makes no sense to say that a state court unreasonably applied clearly established law to facts it didn't know existed."

B. Further, respondent should not have been afforded a federal evidentiary hearing to develop his new medical-opinion "facts," as he "failed to develop" them in state court despite ample opportunity to do so. Here, the California Supreme Court appointed counsel for respondent and gave him funds to hire experts. Respondent presented opinions of various medical experts to support his state habeas corpus petitions. Although respondent later presented other experts with new and fundamentally different opinions in federal court, he never showed that he was unable to present that evidence to the state court first. On the contrary, respondent proved fully able to develop the factual bases underlying his ineffective assistance of counsel claim before the federal evidentiary hearing was conducted. Indeed, the entire thrust of respondent's ineffective assistance of counsel claim—that counsel at the earlier trial should have ferreted out the evidence respondent later

presented in federal habeas corpus proceedings—is an admission that such evidence always had been available.

Despite the Ninth Circuit's reliance on it as entitling respondent to a federal evidentiary hearing, the fact that California Supreme Court did not afford respondent a state evidentiary hearing was immaterial. California habeas law required the state court, in determining whether respondent had made out a prima facie case of a constitutional violation, to assume provisionally that his factual allegations were true. Respondent hardly could be aggrieved where his allegations were provisionally deemed true without having to prove them in a contested hearing.

C. In order to prevent federal courts from misusing facts developed for the first time in federal court to inform, improperly, the § 2254(d)(1) inquiry, it should be made clear that the § 2254(d)(1) inquiry must be resolved before a federal evidentiary hearing is considered. Such a procedure is consistent with how this Court has previously conducted the § 2254(d)(1) inquiry, and how this Court has instructed that related inquiries should be conducted. It also best serves principles of judicial economy, and is the best method for ensuring the federal courts pay genuine deference to state-court adjudications of federal constitutional claims.

II.

Section 2254(d)(1) precludes federal habeas corpus relief on respondent's ineffective assistance of counsel claim because the state-court record supported, as objectively reasonable under this Court's "clearly established" law, the California Supreme Court's rejection of respondent's claim on the merits. That is, the state-court record afforded a reasonable basis for the conclusion that trial counsel's performance was neither incompetent nor prejudicial under *Strickland* v. *Washington*.

A. Here, trial counsel investigated respondent's mental state, by hiring a psychiatrist who examined respondent and reported to counsel that respondent was simply a psychopath who suffered from no mitigating mental disease or defect. Further, trial counsel investigated and presented mitigating evidence of respondent's background and upbringing, through respondent's mother. These actions met, indeed, exceeded, the constitutional minima established in *Strickland* v. *Washington* and further illuminated by this Court in *Burger* v. *Kemp*. At the very least, such a conclusion would be reasonable and therefore sufficient under § 2254(d)(1).

B. Similarly, the state-court record reasonably supported the conclusion that the alternative evidence respondent relied upon would not likely have mattered. The circumstances of the crime were strongly aggravating: respondent stabbed to death two men whose only offense was to come upon

respondent and his accomplices as they were burglarizing the house they had been asked to watch. Also aggravating was respondent's own guilt-phase testimony, in which he boasted about his lifelong career as a violent criminal. And the state-court record was clear that the only psychiatrist who examined respondent at the time of trial was of the opinion that respondent was simply a psychopath with no mitigating mental defects or disorders.

Conversely, despite the Ninth Circuit's exaggerated view of it, the alternative mitigation evidence that respondent presented to the state court would hardly have been persuasive in a case in which respondent's clear-thinking and motivations were plain.

* * *

When properly viewed with the requisite "double deference" required by *Strickland* and § 2254(d)(1), the California Supreme Court's rejection of respondent's ineffective assistance of counsel claim cannot be dismissed as "unreasonable" on the basis of the evidence presented to it and the clearly-established law that governed respondent's claim. The state court's adjudication, therefore, precludes relief on respondent's claim.

ARGUMENT

I.

A Federal Court May Not Reject a State-Court Adjudication of a Claim as "Unreasonable" Under 28 U.S.C. § 2254 Based on a Factual Predicate for the Claim that the Petitioner Never Presented to the State Court

As amended by AEDPA, 28 U.S.C. § 2254 sets out a framework of tight preconditions to a grant of federal habeas corpus relief to a state prisoner. First, relief is available only if the petitioner first exhausts his state remedies by fairly presenting both the factual and legal bases of his federal claim to the state courts. § 2254(a)-(c). Second, where the state court denies relief on the merits, § 2254(d)(1) provides that habeas relief "shall not be granted" unless the state-court adjudication of the claim "resulted in a decision that was contrary to, or involved the unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. . . ." § 2254(d)(1). This is a "'highly deferential standard for evaluating state-court rulings' which demands that state-court decisions be given the benefit of the doubt." *Woodford* v. *Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (quoting *Lindh* v. *Murphy*, 521 U.S. 320, 333 n.7 (1997); *Schriro* v. *Landrigan*, 550 U.S. 463, 473 (2007) (unreasonableness is a "significantly higher threshold" than correctness).

Section 2254(d) therefore focuses the question of relief on the state-court adjudication. *Bell* v. *Cone*, 535 U.S. 685, 694 (2002). Regardless of the federal court's opinion of the merits of the claim, federal collateral relief is precluded if the state-court rejection of the claim was at least reasonable. *Lockyer* v. *Andrade*, 538 U.S. 63, 75-76 (2003); *Visciotti*, 537 U.S. at 24-25; *Yarborough* v. *Alvarado*, 541 U.S. 652, 665 (2002). The reasonableness of the state court's decision is "the only question that matters." *Andrade*, 538 U.S. at 71.

The Ninth Circuit's opinion reveals a fundamental misunderstanding of § 2254(d)(1). Rather than examining the record that was before the California Supreme Court when analyzing whether the state court's decision was reasonable, the Ninth Circuit tainted that inquiry by relying on facts presented for the first time in federal court. The Ninth Circuit compounded this error by misinterpreting 28 U.S.C. § 2254(e)(2) as allowing the federal court to consider, on the § 2254(d)(1) question, new evidence to prove new factual allegations that respondent could have presented to the state court, but did not.

Instead, review of the reasonableness of the state court's application of this Court's precedents to a petitioner's claim may be accomplished under § 2254(d)(1) only if the review is limited to "clearly established" law at the time of the state ruling and to the same facts as were presented to the state court. This conclusion follows from the plain language of

§ 2254(d)(1), the structure and logic of AEDPA's habeas corpus reforms, and from this Court's own stated understanding of how § 2254(d)(1) works.

A. A Federal Court May Not Deem a State Adjudication "Unreasonable" Based on Facts Never Presented to the State Court

1. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross* v. *FBL Financial Services, Inc.*, 129 S. Ct. 2343, 2350 (2009) (quoting *Engine Mfrs. Assn.* v. *South Coast Air Quality Management Dist.*, 541 U.S. 246, 252 (2004)). Accordingly, courts "must enforce plain and unambiguous statutory language according to its terms." *Hardt* v. *Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2156 (2010). Thus, when a statute's language is clear under the ordinary meaning of the words, interpretation of the statute "begins . . . and . . . ends there as well." *Harris Trust and Sav. Bank* v. *Salomon Smith Barney, Inc.*, 530 U.S. 238, 254 (2000).

The plain language of § 2254(d)(1) requires that "reasonableness" review be confined to the state-court adjudication in context, rather than in light of new facts the state court never saw. Section 2254(d)(1) refers, in the past tense, to whether the state-court ruling "involved" an unreasonable application of clear

law to the facts or "resulted" in a ruling that "was" contrary to clearly established law. The plain and ordinary meaning of these words is retrospective, requiring an examination of the reasonableness of the state-court decision at the time it was made—in the past. See *Florida Dept. of Revenue* v. *Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2331-33 (2008) (use of the past tense refers to a completed action). If the completed action of the state court—denying relief—was objectively reasonable under clearly-established law as applied to the facts alleged or assumed true by the state court, then the state-court ruling cannot be condemned as "unreasonable" just because different facts later seem to a federal court to warrant a different result.

The subdivision's reference to "clearly established Federal law" corroborates this plain-language construction. This Court has instructed that "clearly established federal law" under § 2254(d)(1) is the "governing legal principle or principles set forth by the Supreme Court *at the time the state court renders its decision*." *Lockyer* v. *Andrade*, 538 U.S. at 71 (emphasis added). Likewise, this Court in *Williams (Terry)* v. *Taylor*, 529 U.S. 362, 412 (2000), explained that the "clearly established Federal law standard," against which state adjudications are measured, refers to Supreme Court holdings "as of the time of the relevant state-court decision"—clarifying that the inquiry is retrospective and contextual. 529 U.S. at 412.

2. The broader § 2254 plan confirms the plain language of § 2254(d)(1). The § 2254(d)(2) companion provision also requires that the reasonableness of state-court factual determinations is to be reviewed "in light of the evidence presented in the State court proceedings." There is no reason to think that Congress meant the concept of reasonableness in § 2254(d)(2) to be fundamentally different from reasonableness in § 2254(d)(1). Further, the obvious point of § 2254 is to channel a prisoner's claims first to the state court as the court with "primary responsibility for resolving claims of constitutional error in state criminal trials," *Woodford* v. *Visciotti*, 537 U.S. at 27, and then to require deference to the state court's adjudication of such claims in furtherance of the goal of giving effect to state criminal convictions "to the extent possible under law." *Terry Williams*, 529 U.S. at 404. To allow the federal court to reject a state-court adjudication based on facts never presented in the state court would make § 2254's "exhaustion" rule pointless and its centerpiece requirement of deference to reasonable state-court rulings illusory.

3. This Court, moreover, has recognized that reasonableness review under § 2254(d)(1) depends on the case only as presented to the state court. In *Terry Williams*, this Court explained that § 2254(d)(1) review focuses on how a state court applies the law "to the facts of a state prisoner's case." 529 U.S. at 407-08. As this Court described the inquiry, it is the facts that the state court "confronts" that inform the

§ 2254(d)(1) analysis. *Id.* at 405. This rules out consideration of facts the state court did not confront. Further reflecting the statutory language, *Terry Williams* articulated the federal court's § 2254(d)(1) inquiry in the *past* tense, asking "whether the state court's application of clearly established federal law *was* objectively unreasonable." *Id.* at 409 (emphasis added). That is, under § 2254(d)(1), the state-court ruling is reviewed in the context of the facts and the law presented to the state court.

This Court's decision in *Holland* v. *Jackson*, 542 U.S. 649, 652 (2004), should have eliminated any potential remaining ambiguity on the question. *Holland* instructed that, in analyzing a claim under § 2254(d)(1), "whether a state court's decision was unreasonable must be assessed *in light of the record the court had before it*." (Emphasis added.) This Court criticized the Sixth Circuit for finding the state-court determination unreasonable under § 2254(d)(1) based upon evidence that had not been presented to the state court in a procedurally proper manner. *Id.* Because the evidence was "not properly before the state court," it was not proper for the federal court to rely upon the evidence in assessing the reasonableness of the state-court determination under § 2254(d)(1). *Id.*

4. *Holland*'s holding, that whether a state-court decision is reasonable is assessed in light of the facts available to the state court, is consistent with how this Court has instructed reviewing courts to assess whether an action was "reasonable" in other contexts.

In *Strickland* v. *Washington*, 466 U.S. 668, 691 (1984), this Court instructed that whether a trial attorney's decisions were reasonable—an assessment that, like § 2254(d)(1), involves judicial deference, *Yarborough* v. *Gentry*, 540 U.S. 1, 6 (2004)—must be made in light of the facts known to counsel at the time. Similarly, in interpreting another part of § 2254, this Court in *Williams (Michael)* v. *Taylor*, 529 U.S. 420, 435 (2000), held that the determination of whether a prisoner made a "reasonable attempt" to investigate and pursue claims in state court—and thus satisfy due diligence under § 2254(e)(2)—is assessed "in light of the information available to him at the time." Other examples abound. Whether a search was "reasonable" under the Fourth Amendment is assessed "in light of the facts and circumstances *then* known to" the officer. *Scott* v. *United States*, 436 U.S. 128, 137 (1978) (emphasis added). Whether the force used to effectuate a detention was reasonable "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham* v. *Connor*, 490 U.S. 386, 396 (1989). In short, this Court has recognized that whether a past decision was "reasonable" must be assessed in terms of what was known to the decision-maker at the time the decision was made.

5. The Ninth Circuit's contrary view—that nothing in § 2254(d)(1) precludes consideration of facts withheld from the state court when analyzing whether the state court's determination was

reasonable, PA 29—defies logic and strays from this Court's teaching. Under the Ninth Circuit's construction of § 2254(d)(1), a federal court would be free to invalidate a state-court decision rejecting a claim of federal constitutional error *even if every court would agree that the state-court decision was perfectly reasonable based upon the factual allegations presented to the state court*, if other facts never presented to the state court support a different result. As explained above, the Ninth Circuit's rule upends the central AEDPA reform of federal habeas corpus review of state-court judgments.

The Ninth Circuit's decision in this case is a stark illustration of how it is inimical to § 2254(d) deference to allow the federal court to reject a state-court adjudication as "unreasonable" in light of facts that the petitioner withheld from the state court. In concluding that the new facts did not render respondent's ineffective assistance of counsel claim "unexhausted," the Ninth Circuit asserted that the new facts did not "fundamentally alter[ ] the penalty phase ineffective assistance claim that the California Supreme Court already considered. . . ." PA 35. But the factual allegations respondent presented to the California Supreme Court and the new facts suggested by the evidence adduced at the federal evidentiary hearing are not simply different; they are irreconcilable. And the new facts were crucial to the Ninth Circuit's decision.

Both habeas corpus petitions filed in the California Supreme Court alleged that respondent

"was substantially impaired by a bipolar mood disorder operating synergistically with seizure disorder at the time the crime was committed," and that "[a]t the time of the offenses, [respondent's] disorders impaired his capacity to appreciate the criminality of his conduct and/or to conform his conduct to the requirements of law." RA 142, 170. In support of those assertions, respondent presented the declaration of his retained expert, Dr. Woods, who opined "that at the time of the stabbings Mr. Pinholster was suffering a complex partial seizure which by definition would imply impaired consciousness and therefore the inability to form intent." RA 239. Respondent also offered Dr. Woods's opinions in support of both his original federal petition and his amended federal petition. JA 183; RA 419, 422.

At the federal evidentiary hearing, however, respondent never even attempted to prove the allegations he made in state court (or, for that matter, in his federal petition). Instead, respondent presented his new expert Dr. Vinogradov who, in her direct testimony declaration submitted to the district court, and confirmed by her on cross-examination at the district court evidentiary hearing, specifically *excluded* a diagnosis of bipolar disorder, thus directly contradicting the first diagnosis Dr. Woods offered to the state court (as well as the diagnosis respondent pled in his federal petition). RA 197; Ninth Circuit Excerpts of Record (9th Cir. ER) vol. 5 at 1298. Dr. Vinogradov also unambiguously testified that respondent was *not* in the throes of a seizure at the time of the murders—directly contradicting Dr. Woods's

second diagnosis. 9th Cir. ER vol. 5 at 1358. Respondent's other expert at the federal evidentiary hearing, Dr. Olson, likewise admitted on cross-examination that it was his opinion that respondent had *not* been experiencing an epileptic seizure at the time he committed the murders—also directly contradicting Dr. Woods's second diagnosis. See district court evidentiary hearing reporter's transcript (EH RT) of 9/10/2002, dkt. no. 221 at 82-83.

Thus, the evidence respondent presented to the district court specifically and explicitly repudiated the mental health allegations made in state and federal court.[2] The principal operative fact alleged to the California Supreme Court, that trial counsel should have discovered and presented evidence that respondent was a bipolar psychotic who was in the midst of a seizure at the time of the crimes, was abandoned and, ultimately, disproven. Instead, the district court and the Ninth Circuit relied on a "fact" different from the one respondent presented to the state court: that trial counsel should have discovered and presented evidence that respondent has organic brain damage. PA 50-54. There can be no more fundamental alteration of a claim than to abandon,

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[2] One of the ironies of the instant case is that the Ninth Circuit's decision ignored the fact that the evidence adduced at the federal evidentiary hearing proved that the California Supreme Court's rejection of respondent's claim of ineffective assistance of counsel was not only *reasonable*, it was *correct*, because the central facts in support of the claim presented to the California Supreme Court were, as noted, false.

then disprove, its central factual allegations, and substitute in other, irreconcilable factual allegations, that the federal court then treats as crucial to validate the claim. As Chief Judge Kozinski said in his dissent: "I don't believe that AEDPA sanctions this bait-and-switch tactic. . . ." PA 84.

* * *

The plain language of the statute, Congress' intent as found by this Court, this Court's prior decisions interpreting the subdivision, and simple logic all compel the conclusion that when examining whether a state-court rejection of a claim was objectively reasonable under § 2254(d)(1), a federal court must confine itself to *only* those facts presented to the state court in support of the claim. It must *not* consider facts that were not presented to the state court in support of the claim.

B. Section 2254(e)(2) Provides No Basis for Attacking the Reasonableness of the State Court's Adjudication

In seeking to justify its erroneous reliance on evidence withheld from the state court as a basis for condemning the state-court adjudication as "unreasonable" under § 2254(d)(1), the Ninth Circuit committed a second error. It interpreted § 2254(e)(2) as permitting the federal evidentiary hearing that gave respondent the opportunity to prove new facts that he could have presented to the state court but did not. PA 28-35. But respondent did not qualify for an

evidentiary hearing under § 2254(e)(2), because he failed to develop the new factual bases for his ineffective assistance of counsel allegation in state court. And, in any event, nothing in § 2254(e)(2)—or in any other source of authority to hold an evidentiary hearing—allows a federal court to dispense with § 2254(d)(1)'s prohibition against relief where the state court reasonably adjudicated the petitioner's exhausted claim on its merits.

1. Section 2254(e)(2) provides that the federal court "shall not" hold an evidentiary hearing on a claim "[i]f the applicant has failed to develop the factual basis of the claim in State court proceedings." Respondent ran afoul of § 2254(e)(2), because he failed to develop in state court the psychiatric opinion evidence that ultimately served as the basis for the Ninth Circuit's grant of federal habeas corpus relief.

In *Michael Williams* v. *Taylor*, this Court explained that "failed to develop" means "lack of diligence or some greater fault attributable to the prisoner or the prisoner's counsel." 529 U.S. at 432. There, the petitioner alleged that the prosecution had violated *Brady* v. *Maryland*, 373 U.S. 83 (1963), by failing to turn over a report containing the results of a psychiatric examination of a prosecution witness. *Id.*, 529 U.S. at 427. This Court found that the petitioner had failed to exercise diligence in presenting the claim to the state court because state habeas counsel had the same access to the file containing the allegedly improperly withheld report as federal habeas counsel. 529 U.S. at 438-39.

Further, numerous references to the report in a transcript to which state habeas counsel had access had put state habeas counsel on notice that the report existed. *Id.* Because state habeas counsel failed to diligently investigate the report, the petitioner was not entitled to a federal evidentiary hearing to prove his factual allegations. *Id.* at 439-40.

Respondent's case is in this important respect like *Michael Williams*. Here, respondent had the same access to psychiatric opinion evidence in the state post-conviction proceedings as he did in federal court. The California Supreme Court's capital-case policies, in place at the time respondent was preparing his state petitions, required the appointment of state habeas counsel and authorized counsel to expend, without prior approval of the court, up to $3,000 for investigation alone, with additional funds for investigation available if needed. *In re Sanders*, 981 P.2d 1038, 1050-52 (Cal. 1999); *In re Clark*, 855 P.2d 729, 751 n.19 (Cal. 1993). And, in fact, respondent's counsel hired Dr. Woods, who examined respondent, reviewed the earlier examination conducted by Dr. Stalberg, and presented the California Supreme Court with a new expert opinion in support of respondent's ineffective assistance of counsel claim. RA 221-50. In addition, during the second state habeas proceedings, respondent had the services of *two* mental health professionals, Drs. Woods and Stalberg; and respondent presented declarations from both of these experts to the California Supreme Court

in support of his ineffective assistance of counsel claim. RA 221-50, 218-20.

The record further shows that Drs. Vinogradov and Olson were retained by respondent's attorneys, that they examined respondent, and that they generated reports detailing their opinions about respondent *all before the federal evidentiary hearing began*.[3] That respondent did not decide to contact Drs. Olson and Vinogradov until after the district court granted an evidentiary hearing fatally undermines any claim that respondent was diligent. Nothing in the federal court's order granting an evidentiary hearing provided respondent any access to these experts that was previously unavailable. Certainly, "[t]he District Court made no finding that respondent had been diligent in pursuing [Dr. Vinogradov's and Dr. Olson's] testimony (and thus that § 2254(e)(2) was inapplicable) or that the limitations set forth in § 2254(e)(2) were met." *Holland* v. *Jackson*, 542 U.S. at 653. In the absence of such a finding, the district court's determination that respondent "did not fail to

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[3] Dr. Vinogradov was retained by respondent's attorneys in April 2002, examined respondent on April 10 and July 8, 2002, and executed a declaration outlining her conclusions on September 6, 2002. RA 176-77, 217. Dr. Olson was retained by respondent's attorneys in May 2002, examined respondent on June 27, 2002, and executed a declaration outlining his conclusion on September 9, 2002. RA 172, 175. The evidentiary hearing began on September 10, 2002. PA 262.

develop the factual basis of the claim in state court . . . ," PA 256—a showing required by § 2254(e)(2) and *Michael Williams*—is unsupportable. On the contrary, as Chief Judge Kozinski noted in his dissent, "The reports of Drs. Olson and Vinogradov are just like the evidence in *Michael Williams* that the Supreme Court said couldn't be used because it was not first presented in state court." PA 82.

Indeed, as Chief Judge Kozinski noted in his dissent, any argument that Drs. Vinogradov and Olson, or other experts offering similar opinions, could not have been presented to the California Supreme Court on habeas would fatally undermine the necessary conclusion that trial counsel was deficient in failing to secure such experts at the time of trial. "[E]ither . . . habeas counsel was not diligent, or trial counsel was not ineffective. There's no escape." PA at 80-81.

2. The Ninth Circuit was also wrong in its further ruling that, just because the California Supreme Court did not afford respondent an evidentiary hearing, he somehow became entitled to a § 2254(e)(2) hearing and could not be faulted for having failed to develop in state court the evidence of Dr. Olson's and Vinogradov's opinions. PA 33-34. As explained above, the California Supreme Court gave respondent every opportunity to develop his ineffective assistance of counsel claim.

Moreover, the absence of a state-court evidentiary hearing hardly prevents a petitioner from alleging the factual bases of his claim in the state court. In California, especially, prisoners such as respondent cannot fairly complain about the absence of an evidentiary hearing. In both habeas cases presented to it by respondent, the California Supreme Court under state law reviewed the well-pleaded factual allegations in the state habeas petitions in the light most favorable to granting relief. Once respondent identified the alleged illegality underlying the conviction and "state[d] fully and with particularity the facts on which relief [was] sought," the California Supreme Court "evaluate[d] it by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief." *People* v. *Duvall*, 886 P.2d 1252, 1258-59 (Cal. 1995). Here, the California Supreme Court found that no prima facie case for relief had been stated, and so it summarily denied the petitions on the merits. PA 300-03, see *Duvall*, 886 P.2d at 1258-59.[4] But that

[4] If a prima facie case for relief had been found, an order to show cause would have issued, directing the custodian to file a return justifying the confinement. *Duvall*, 886 P.2d at 1258-59. The issuance of an order to show cause would have indicated that the California Supreme Court had made a preliminary assessment that respondent would be entitled to relief if the factual allegations were proven true. *Id.* Following the return, respondent would then have had the opportunity to file a traverse. If, following the pleadings, there had been a disputed issue of material fact, a referee would have been appointed to conduct an evidentiary hearing. *Id.* at 1260-61.

ruling does not detract from the fact that respondent in effect received the benefit of an evidentiary hearing and ran none of its risks: his factual allegations were treated as true for purposes of the state court's ruling.

So, the evidentiary hearing that the Ninth Circuit criticized the California Supreme Court for denying to respondent would have done nothing to improve the factual posture of respondent's case. Indeed, given that the State would have been entitled to meet any evidence that respondent presented in support of his factual allegations with cross-examination and responsive evidence, the factual posture of respondent's claim only would have gotten worse. See, e.g., 9th Cir. ER vol. 4 at 976 (Dr. Stalberg testifies at the federal evidentiary hearing that the additional material he has reviewed since trial did not alter—indeed, it confirmed—his opinion that respondent is simply a psychopath).

* * *

The Ninth Circuit failed to pay proper respect to the limitations on relief codified in § 2254(d)(1) or to the limitations on federal evidentiary hearings codified in § 2254(e)(2). Evidence in support of facts that could have been presented to the California Supreme Court but were not should not have been received, and should not have formed the basis for granting respondent habeas corpus relief.

C. Resolution of the § 2254(d)(1) "Reasonableness" Question Should Precede Any Presentation of Evidence in Federal Court

Given how the Ninth Circuit misused the evidence taken at the federal evidentiary hearing, it is clear that some guidance is needed regarding how to best approach the various components of the § 2254 analysis of a claim that was denied on the merits in state court. As this Court has recently stated, § 2254(d) sets forth "threshold restrictions . . . on granting federal habeas relief to state prisoners." *Renico* v. *Lett*, 130 S. Ct. 1855, 1862 n.1 (2010). In order to ensure that § 2254(d)(1) is properly treated as a threshold restriction, the § 2254(d)(1) reasonableness question—"the only question that matters," *Lockyer* v. *Andrade*, 538 U.S. at 71—should be resolved before any evidence is taken in a federal evidentiary hearing.

1. This Court has already recognized the logic and prudence of undertaking the § 2254(d)(1) inquiry before taking evidence. As noted above, this Court in *Michael Williams* v. *Taylor*, 529 U.S. 420, limited the factual context of the § 2254(d)(1) inquiry to the facts presented to the state court. That holding was predicated on the assumption that the § 2254(d)(1) analysis precedes consideration of new evidence that might be developed in a federal evidentiary hearing under § 2254(e)(2). This Court held that it was "unnecessary to reach the question whether § 2254(e)(2) would permit a hearing" on a claim

because the claim failed "on the merits under § 2254(d)(1)." *Id.*, at 444.

2. Resolving the § 2254(d)(1) question before taking evidence is also consistent with this Court's expressed preference in a related context. In *Caspari* v. *Bohlen*, 510 U.S. 383, 389 (1994), this Court held that the question of whether habeas relief would depend on recognition of a "new rule" of law, in derogation of *Teague* v. *Lane*, 489 U.S. 288 (1989) (plurality opinion), must be addressed "before considering the merits of the claim." Accord, *Beard* v. *Banks*, 542 U.S. 406, 412 (2004) (*Teague* requires a "threshold" analysis "in addition to any analysis required by AEDPA"). While the *Teague* inquiry is distinct from the § 2254(d)(1) inquiry, *Horn* v. *Banks*, 552 U.S. 264, 272 (2002) (per curiam), the habeas corpus restrictions in § 2254(d)(1) and *Teague* arise from a common concern. *Terry Williams* v. *Taylor*, 529 U.S. at 381-82. The same concerns that led this Court to direct the lower federal courts to examine the *Teague* question before examining the merits of the claim, then, also suggest that the federal courts likewise should resolve the § 2254(d)(1) at the threshold before any evidence is taken.

3. Sound practical reasons clearly support such an approach. Undoubtedly, the great majority of federal habeas corpus petitions filed by state prisoners will prove unsuccessful under § 2254(d)(1). In accord with the plain language of § 2254(d)(1) and this Court's decision in *Holland* v. *Jackson*, the federal court's dismissal of claims reasonably

adjudicated by the state court will be based on the facts alleged or proved in the state court, without reference to any new facts that might be developed in the federal proceedings. A federal evidentiary hearing conducted prior to resolving the § 2254(d)(1) issue would thus prove an unnecessary, if not pointless, exercise in this great majority of cases, because the evidence taken would be unnecessary to the disposition of the case.

Conducting unnecessary evidentiary hearings before resolving the § 2254(d)(1) question is very expensive, too. This is especially so in death penalty cases such as this one. A 1999 Pricewaterhouse-Coopers report, commissioned by the Administrative Office of the United States Courts, hints at the tip of the iceberg of resources expended in such hearings. At the time the report was written, the average federal court cost for legal representation for indigents in California capital cases was approximately $113,000 per evidentiary hearing. PRICEWATERHOUSECOOPERS, "COST OF PRIVATE PANEL REPRESENTATION IN FEDERAL CAPITAL HABEAS CORPUS CASES FROM 1992 TO 1998" (Feb. 9, 1999), pp. i, xvi. To this must be added "the significant costs of federal habeas corpus review" on "[t]he State and the victims." See *Magwood* v. *Patterson*, 130 S. Ct. 2788, 2810 (2010) (Kennedy, J. dissenting), citing *McCleskey* v. *Zant*, 499 U.S. 467, 490-91 (1991). These significant resources should be reserved for cases where the taking of evidence might actually inform

some question of fact relevant to the disposition of the case.

4. Conducting an evidentiary hearing before resolving the likely-dispositive § 2254(d)(1) question also gives rise to a needless risk that facts developed for the first time at the federal evidentiary hearing will improperly influence the federal court's review of the reasonableness of the state court's resolution of the claim. This case well might be an example. Perhaps recognizing that relying on facts never presented to the state court when analyzing the § 2254(d)(1) question was, to say the least, dubious, the Ninth Circuit asserted in a conclusory way that it would have reached the same result even if the new facts had not been considered. PA 34-35. This improbable assertion is unsupported by any analysis, and is irreconcilable with the Ninth Circuit's treatment of the new facts as the principal basis for its determination that respondent was prejudiced by his trial attorneys' decisions. PA 50-54. As Chief Judge Kozinski discussed in his dissent:

> If the majority means that, it should avoid making such terrible law and reach its result without relying on Pinholster's new psychiatric evidence. But I don't believe the majority does mean it. The majority *must rely heavily on the new experts*, *see, e.g.*, maj. op. at 661, 675-77, because everything else Pinholster's lawyers managed to dig up—after sifting through the rubble of his life for close to two decades—is so piddling. It's hardly the stuff that would justify finding

> the state court unreasonable. *See* pp. 709-16 *infra*. The proof is in the pudding: If the expert declarations didn't matter, the majority would leave them out and avoid making an obvious error under *Michael Williams*. That it won't tells us something important.

PA 84.

* * *

The Ninth Circuit's conclusion, that facts never presented to the California Supreme Court undermined the objective reasonableness of the California Supreme Court's rejection of respondent's ineffective assistance of counsel claim, violated § 2254(d)(1). And its concomitant decision to approve an evidentiary hearing to take evidence in support of those new facts violated § 2254(e)(2). These errors resulted in the Ninth Circuit's erroneous decision to grant habeas corpus relief to respondent.

As explained in the following section, an analysis of respondent's claim in light of the state-court record, and paying proper respect to the limitations found in § 2254(d)(1), would have compelled the conclusion that federal collateral relief was unavailable.

II.

FEDERAL HABEAS CORPUS RELIEF IS UNAVAILABLE BECAUSE THE STATE COURT'S REJECTION OF RESPONDENT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WAS REASONABLE

The California Supreme Court rejected respondent's claims on the merits.[5] Thus, the question under § 2254(d)(1) is whether the state-court determination was unreasonable under clearly established federal law.

Strickland v. *Washington*, 466 U.S. 668, articulated a two-prong test for assessing claims of ineffective assistance of counsel. The first prong

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[5] In both its July 19, 1995 order denying the first state petition and its October 1, 1997 order denying the second state petition, the California Supreme Court held, in relevant part, "The petition for writ of habeas corpus is denied on the substantive ground that it is without merit." PA 300, 302. In *Harrington* v. *Richter*, No. 09-587, currently pending before this Court, this Court posed the question, "Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under Strickland v. Washington, 466 U.S. 668 (1984)?" The positions taken in the instant brief are consistent with those taken by the State in *Richter*. Because the state court summarily disposed of respondent's claims "on the merits," the question under § 2254(d)(1) is whether the state court's rejection of the *Strickland* claims was reasonable. As argued here, and in *Richter*, the record before the state court supported a reasonable conclusion that counsel had acted competently and that in any event there was no reasonable probability of prejudice. Relief, therefore, is precluded.

requires the defendant to prove that trial counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-88. The second prong requires the defendant to prove that there is a reasonable probability that he would have received a more favorable determination in the absence of the shortcomings of counsel. *Id.* at 694. The *Strickland* test is "clearly established Federal law" under § 2254(d)(1). *Bell* v. *Cone*, 535 U.S. at 693.

Judicial review of a *Strickland* claim is not only "highly deferential," it is "doubly deferential when it is conducted through the lens of federal habeas." *Yarborough* v. *Gentry*, 540 U.S. at 5; accord, *Knowles* v. *Mirzayance*, 129 S. Ct. 1411, 1420 (2009). The first level of deference is that mandated by *Strickland* itself: "Judicial scrutiny of counsel's performance must be highly deferential." 466 U.S. at 689. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (citing *Michel* v. *Louisiana*, 350 U.S. 91, 101 (1955)). In assessing the performance prong, *Strickland* imposes a "highly demanding" standard upon the defendant to prove "gross incompetence." *Kimmelman* v. *Morrison*, 477 U.S. 365, 382 (1986).

The second level of deference is that owed to the state-court determination that respondent's claim of federal constitutional error lacks merit. § 2254(d)(1);

Yarborough v. *Gentry*, 540 U.S. at 5. That level of deference forbids the federal courts from granting habeas corpus relief even when the state-court decision rejecting the claim was erroneous, provided the decision was reasonable. *Gentry*, 540 U.S. at 5. In applying § 2254(d)'s deference standard, "evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway [state] courts have in reaching outcomes in case by case determinations." *Yarborough* v. *Alvarado*, 541 U.S. at 664. Because the *Strickland* standard is a general one, state courts have great leeway in applying it. *Mirzayance*, 129 S. Ct. at 1420. In federal habeas, the petitioner must show that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner. *Woodford* v. *Visciotti*, 537 U.S. at 25. Unless it was "unreasonable for the state court to conclude that ... defense counsel's performance was not deficient," federal collateral relief must be denied. *Knowles* v. *Mirzayance*, 129 S. Ct. at 1420. Likewise, a federal court may not disturb a state court's decision rejecting a claim of ineffective assistance of trial counsel unless under the facts presented there, the state court could not reasonably determine that the petitioner was not prejudiced by trial counsel's deficiencies. *Sears* v. *Upton*, 130 S. Ct. 3259, 3265-66 (2010); *Porter* v. *McCollum*, 130 S. Ct. 447, 454-55 (2009) (per curiam).

Review of the facts presented to the California Supreme Court under this Court's clearly established

authority reveals that the California Supreme Court's rejection of the claim was reasonable under § 2254(d)(1).

A. The Facts Presented to the State Court Supported the Reasonable Conclusion that Trial Counsel Provided Objectively Reasonable Assistance Under Prevailing Professional Norms

Proof of deficient performance requires a showing that counsel's performance was "outside of the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The decision in *Strickland*, handed down on May 14, 1984, only one week after respondent's jury entered its death-penalty verdicts, 466 U.S. at 668; Trial RT, vol. 54 at 7497-7501, did not simply inform the California Supreme Court of the general constitutional standard applicable to evaluate a given set of facts; it also provided the state court with a clear example of the kind of performance by counsel that satisfies the Sixth Amendment. With *Strickland* as the template for trial counsel's performance, the California Supreme Court's resolution of the ineffective assistance of counsel claim was reasonable. For respondent's counsel did everything defense counsel in *Strickland* did, and more.

Like the instant case, *Strickland* was a capital case in which the defendant accused his trial attorney of failing to adequately investigate and present

evidence in mitigation. 466 U.S. 667. This Court in *Strickland* summarized trial counsel's investigation as follows:

> In preparing for the sentencing hearing, counsel spoke with respondent about his background. He also spoke on the telephone with respondent's wife and mother, though he did not follow up on the one unsuccessful effort to meet with them. He did not otherwise seek out character witnesses for respondent. . . . Nor did he request a psychiatric examination, since his conversations with his client gave no indication that respondent had psychological problems.
>
> Counsel decided not to present and hence not to look further for evidence concerning respondent's character and emotional state.

Id. at 672-73. On federal habeas, the petitioner in *Strickland* argued that his counsel was ineffective because "he failed . . . to request a psychiatric report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner's reports or cross-examine the medical experts." *Id.* at 675, 678.

1 This Court found it sufficient that trial counsel in *Strickland* spoke with potential background mitigation witnesses only by telephone, did no further investigation of background mitigation witnesses, and did not use any background mitigation

witnesses at the penalty phase. This Court held that, after the investigation outlined above, it was reasonable for trial counsel to settle on a theory of the case that involved the presentation of no mitigating evidence whatsoever, and to simply argue that the defendant's life should be spared. *Strickland*, 466 U.S. at 699.

Here, respondent's trial attorneys did more. They not only investigated, but also *presented* a family-background mitigation witness: respondent's mother, Burnice Brashear. Given that the investigation of background mitigation witnesses in *Strickland* passed constitutional muster, the California Supreme Court's decision rejecting respondent's similar claim was at least reasonable.

2. The state record also showed that respondent's trial attorneys did more than did the petitioner's in *Strickland* in investigating and presenting expert opinion testimony. This Court found it acceptable that trial counsel in *Strickland* discarded the notion of presenting mental health evidence without consulting a psychiatrist or securing a psychiatric examination. In respondent's case, by contrast, trial counsel secured the services of a psychiatrist, who examined respondent and issued a report. It was just that the report did not provide any support for a mental health case in mitigation. Rather, the psychiatrist retained by the defense made it clear that respondent "did not manifest any significant signs or symptoms of mental disorder or defect other than his antisocial personality disorder

by history," "it does not appear he suffers brain damage," and neither respondent's "epilepsy, hyperactivity as a child, or incorrigibility were related to the offenses except the incorrigibility reflects upon his psychopathic personality traits." JA 130-31. Given that the investigation of mental health evidence in *Strickland* passed constitutional muster, the record before the California Supreme Court supported a reasonable conclusion that what respondent's attorneys did in respondent's case at least met the same standard. That is, "the state court's application of [this Court's] law fits within the matrix of [this Court's] prior decisions." *Yarborough* v. *Alvarado*, 541 U.S. at 665. Certainly, nothing this Court said in *Strickland* or its progeny "clearly established" that defense counsel must engage in "witness shopping" before a trial may be considered fair and reliable. Indeed, the Ninth Circuit itself repudiated a witness-shopping requirement in *Hendricks* v. *Calderon*, 70 F.3d 1032, 1038-39 (9th Cir. 1995), which was decided shortly after the California Supreme Court denied respondent's first state petition.

Burger v. *Kemp*, 483 U.S. 776 (1987), likewise provides an instructive example. Defense counsel talked with Burger's mother, a family friend who had acted as a "big brother" to Burger, and friends of Burger. *Id.* at 790-91. Counsel also hired a psychologist, who examined Burger. *Id.* Based upon this investigation, counsel elected to present no evidence at the penalty phase. *Id.* at 788. In finding that counsel performed to the constitutional minima,

this Court found that "counsel's decision not to mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional judgment." *Id.* at 794. Respondent's counsel investigated respondent's background to essentially the same extent as Burger's counsel did Burger's. Thus, the record before the California Supreme Court supported the reasonable conclusion that trial counsel's efforts satisfied the constitutional standard.

3. The Ninth Circuit not only disregarded the cautionary "doubly deferential" approach to claims of ineffective assistance of counsel this Court has mandated, *Yarborough* v. *Gentry*, 540 U.S. at 5, it added an unsupportable element to the performance inquiry. Ignoring the instructive examples of *Strickland* and *Burger*, the Ninth Circuit treated the generalized 1982 ABA Standards as defining the prevailing professional norm governing a capital-case mitigation defense in California in 1984. PA 38; compare *Bobby* v. *Van Hook*, 130 S. Ct. at 16-17. The Ninth Circuit compounded that error by relying on those standards to erect a constitutional rule that compels capital-case counsel to present, not just "humanizing evidence," see PA 86, but a specific kind of humanizing evidence: that the defendant had a bad childhood. PA 47, 49, 53, 54.

The resulting Ninth Circuit rule is precisely the sort of "rigid" and hindsight ineffective-assistance-of-counsel rule that this Court has condemned. See *Yarborough* v. *Gentry*, 540 U.S. at 8; *Strickland*, 466 U.S. at 688-89. As Chief Judge Kozinski noted in his dissent, "This is exactly what the Supreme Court summarily reversed the Sixth Circuit for doing in *Van Hook*. . . ." PA 86. *Knowles* v. *Mirzayance*, 129 S. Ct. at 1419, similarly rejected an attempt by the Ninth Circuit to engraft onto *Strickland* a rigid corollary requiring lawyers to pursue tactics when there is "nothing to lose." Yet here, the Ninth Circuit once again betrayed its misapprehension that there is a "one-size-fits-all" approach to the investigation and presentation of evidence at the sentencing phase of a death-penalty trial. Contrary to the Ninth Circuit's holding, nothing this Court has ever said would have led the California Supreme Court to conclude that such a rule was clearly established. Indeed, this Court has said precisely the opposite: "There are countless ways to provide effective assistance in any given case." *Strickland*, 466 U.S. at 689.

Under the Ninth Circuit's novel rule, trial counsel should have disregarded what respondent's own mother told them about respondent's background, and should have disregarded what the defense-retained psychiatrist told them. Instead, according to Ninth Circuit, trial counsel should have continued to dig into respondent's past and further investigated his mental state. But that is contrary to this Court's teaching that trial counsel is entitled to

make a reasonable decision to curtail additional investigation depending upon what the initial investigation reveals. *Burger* v. *Kemp*, 483 U.S. at 795. To survive "reasonableness" review under § 2254(d)(1), the California Supreme Court ruling hardly needed to conform to the Ninth Circuit's idiosyncratic view of the obligations purportedly imposed on respondent's trial counsel by the generalized 1982 ABA Standards. And, while the Ninth Circuit ignored the conclusions of the expert the defense retained at trial—Dr. Stalberg—in its decision criticizing trial counsel for failing to further investigate possible mental health evidence, the California Supreme Court was not required to do so

Given the clear guidance of *Strickland*—particularly the mandated presumption that trial counsel performed competently—it was reasonable for the California Supreme Court to reject respondent's claims that trial counsel performed incompetently. On this basis alone, the California Supreme Court reasonably rejected respondent's claim of ineffective assistance of counsel.

B. The Facts Presented to the State Court Supported the Reasonable Conclusion that Respondent Was Not Prejudiced by Any Alleged Deficiencies of Counsel

The second prong of the *Strickland* test—prejudice—requires a showing of a "reasonable

probability that, but for counsel's unprofessional errors, the result of the [trial] would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id.*; see also *Woodford* v. *Visciotti*, 537 U.S. at 22. Based on the facts presented to the California Supreme Court, it was reasonable to conclude that respondent failed to meet this standard.

1. Any argument that respondent was prejudiced by the purported deficiencies of counsel faces special and insuperable obstacles in this case. First, the circumstances of the crime were profoundly aggravating: respondent personally stabbed both victims in the chest, inflicting fatal wounds to both and then bragged how he and Brown "did it" and "got 'em good." Later, while washing his victims' blood off his knife, respondent said, "you got to do what you got to do."

And respondent himself presented damning aggravating evidence in his own guilt-phase testimony: he "gloried" in his criminal disposition, boasting of having committed "hundreds" of armed robberies during his lengthy and successful life in crime. PA 312-13, 379-80. In *Smith* v. *Spisak*, 130 S. Ct. 676, 687-88 (2010), this Court concluded that the defendant was not prejudiced by the purported ineffective assistance of counsel based, in part, on the defendant's "boastful" testimony regarding his life of crime. Similarly, the original three-judge panel of the Ninth Circuit found that any alleged shortcomings in

trial counsel's investigation and presentation of the case in mitigation were harmless:

> Pinholster's violent past—a past Pinholster proudly boasted about to the jury—offsets the mitigating evidence. Pinholster bragged that he had committed hundreds of armed robberies within a three-year time period. In addition, he admitted to a prior kidnaping, during which he held a knife to the victim's throat. And, unlike the petitioner in [*Terry*] *Williams*, Pinholster neither expressed remorse over the murders of Thomas Johnson and Robert Beckett, nor attempted to aid the police in their investigation. Rather, Pinholster threatened to kill the State's lead witness, Art Corona, and proudly recounted his recusant behavior in front of the jury.

PA 217. Given the profoundly aggravating evidence that came out of respondent's own mouth, the purportedly mitigating effect of the alternative background evidence that the Ninth Circuit relied upon would have been minimal.

2. Further, the California Supreme Court was well aware that the opinions of the only mental health expert who examined respondent at the time of trial would have been of no assistance in the case in mitigation. See JA 129-32. As noted, Dr. Stalberg informed trial counsel that respondent had no signs or symptoms of any brain damage or other mental disease or defect, other than his epilepsy, which had no bearing on his behavior during the crimes, and his

history of antisocial personality disorder. Respondent was

> able to describe his action on the night in question in great detail, omitting of course any direct involvement with the victims. It would not appear therefore he was significantly intoxicated or impaired on the night in question.
>
> Additionally, considering the statements attributed to the defendant by witnesses, it would appear that he was fully aware of what he was doing at the time of the offenses.

JA 130-31.

Finally, Dr. Stalberg concluded,

> As for mitigation, it does not appear Mr. Pinholster's epilepsy, hyperactivity as a child, or incorrigibility were related to the offenses except the incorrigibility reflects upon his psychopathic personality traits. He was not under the influence of extreme mental or emotional disturbance, nor did he have impaired ability to appreciate the criminality or conform his conduct to the requirements of the law.

Id. at 131. Tellingly, in neither his first nor his second state habeas petition did respondent ever withdraw the opinion of Dr. Stalberg. And in light of the well-reasoned opinions of Dr. Stalberg, the facts presented to the California Supreme Court compelled the conclusion that any mental-health case in mitigation

that respondent might have attempted to put together at the time of trial would have been unpersuasive in attempting to convince the jury to spare respondent's life.

Even if respondent had attempted to mount a penalty-phase defense predicated on mental disease or defect, he could only have presented the evidence that he actually had available to him. That evidence proved that during the murders respondent was sober and fully in control of his actions; it is simply that his actions were those of a remorseless, conscienceless psychopath. Such evidence would hardly have mitigated respondent's moral culpability for the two murders he committed with his own hands.

* * *

Section 2254(d)(1) should have precluded consideration of facts never presented to the California Supreme Court in examining whether the state court's rejection of respondent's claim of ineffective assistance of counsel was reasonable. Section 2254(e)(2) should have precluded the district court from taking evidence in support of facts that could have been, but were not, presented to the California Supreme Court. Finally, the facts presented to the California Supreme Court reasonably supported the conclusion that trial counsel acted reasonably when they relied upon the information they received from respondent and his mother and the advice of their psychiatric expert when formulating and presenting the case in mitigation at

the penalty phase of respondent's trial, and that respondent was not prejudiced by the purported errors.

CONCLUSION

The judgment the United States Court of Appeals for the Ninth Circuit should be reversed.

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RESPONDENT'S BRIEF

Supreme Court, U.S.
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No. 09-1088

In The
Supreme Court of the United States

VINCENT CULLEN, JR., Acting Warden,
California State Prison at San Quentin,

Petitioner,

v.

SCOTT LYNN PINHOLSTER,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether a federal court may grant relief in a case governed by AEDPA based, in part, on evidence presented at an evidentiary hearing permitted by 28 U.S.C. § 2254(e)(2) and *(Michael) Williams v. Taylor*.

2. Did trial counsel, who announced at the guilt verdicts that they had "done nothing to prepare mitigation"; declined an offered continuance; worked only 6.5 hours to prepare; and despite compelling evidence of Respondent's brain damage, presented just one lay witness (whose testimony was harmful), render ineffective assistance at penalty?

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STATEMENT OF THE CASE

Scott Pinholster's trial attorneys were unaware that a death penalty phase would follow a guilty verdict at his murder trial; they had neglected to look in the file and read the state's notice that it was seeking death. When, after the guilt verdict, the attorneys learned of the penalty phase, they proceeded without additional investigation, declining the trial court's offer of a continuance. Six hours of preparation later, they presented one witness, Pinholster's mother. Their preparation did not include investigation of Pinholster's background for physical abuse. It did not include looking for educational or medical records or hiring anyone to evaluate Pinholster beyond the brief, incomplete evaluation that was conducted during guilt phase.

These failures meant, as the evidence submitted to the state habeas court showed, that readily discoverable mitigating evidence went unheard. The jury was never told that Pinholster was repeatedly abused by his stepfather and his grandmother, or that he came from a family rife with mental illness. They never were told that Pinholster was designated for special education classes, committed to a mental hospital at age 11, and suffered two serious childhood head injuries resulting in organic brain damage. The state habeas court ruled, without explanation, that the attorneys had not been ineffective. After an evidentiary hearing, a federal district court granted habeas relief. The court of appeals affirmed, agreeing that the record demonstrated that counsel had rendered ineffective assistance. The case is before

this Court on the State's challenge to the ruling of the lower courts.

1. The Offenses

At a party, Pinholster, David Brown and Art Corona agreed to steal drugs from Michael Kumar, a marijuana dealer whose house had been the target of a "dope ripoff" on prior occasions. Pinholster had been drinking excessively and smoking marijuana at the party. (PA 167-69, 171-72.)[1]

Corona drove them toward Kumar's house, stopping en route at the home of Pinholster's friend, Lisa Tapar. Pinholster left the car and began pounding on the front door. When Tapar answered, Pinholster announced he "had a message from God." Alarmed by Pinholster's appearance and behavior, Tapar and her friend slammed the door shut and refused to speak with him further. Tapar told another guest inside the home that Pinholster was acting "crazy." Pinholster repeatedly stabbed a knife into the door, then vandalized Tapar's car. (RT 4666-71.)

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[1] PA refers to Petitioner's Certiorari Appendix; RA refers to Respondent's Certiorari Appendix; JA refers to the Joint Appendix. RT refers to the state trial court Reporter's Transcript; CT refers to the state trial court Clerk's Transcript; CT Supp. refers to the state trial court Supplemental Clerk's Transcript. EHRT refers to the federal court Evidentiary Hearing Reporter's Transcript; CR refers to the docket number of federal district court case number CV 95-06240.

After this bizarre incident, Pinholster, Brown, and Corona went to Kumar's house. They found it empty and the back door unlocked. (PA 307-08.) While Pinholster and his cohorts ransacked Kumar's home, Thomas Johnson (who worked for Kumar's marijuana operation and was house-sitting for him) and Robert Beckett unexpectedly entered through the front door. (PA 4.) As Pinholster, Brown and Corona headed for the back door, Johnson and Beckett confronted them, yelling "You guys are caught finally!" (CT 207.) Johnson and Beckett were stabbed to death.

Pinholster took each victim's wallet, and he, Brown and Corona left in Corona's car. Pinholster and Brown commented that they "got 'em good." (RT 4947.) The men divided up the proceeds of the robbery: $23 and a quarter-ounce of marijuana. (PA 309.)

When he learned that the police were looking for him, Corona turned himself in and told them that Pinholster had stabbed the victims. He later changed his account to implicate Brown in one of the stabbings. (PA 309.) Based on Corona's statements, Pinholster and Brown were arrested.

2. The Capital Charges and Trial

Pinholster and Brown were joined for trial. Marvin Part was appointed as counsel for Pinholster. Part, however, refused to investigate the case for over a year, leading Pinholster to represent himself. (RT 109-A; 117-A.)

The prosecutor who headed the branch where the charges were filed recommended not seeking the death penalty. Although the district attorney agreed with regard to Brown, he nevertheless sought the death penalty against Pinholster. (RA 25.)

After Pinholster asked for new counsel, Harry Brainard was appointed. (PA 8.) Two weeks before trial, Wilber Dettmar was added as second counsel. (PA 172-73 n.5.) Brainard and Dettmar incorrectly believed that because they never personally received notice of the prosecution's intent to present aggravating evidence at a penalty trial – notice had only been given to Pinholster when he was *pro se* – the case could not proceed to penalty phase. (PA 264-25.) Brainard declined the prosecutor's offer to review her "entire file" (RT 7259-60), which contained a copy of the written notice regarding penalty. (RT 7251.) Accordingly, they took no actions before trial to prepare for penalty phase.

Counsel did not file any pretrial motions, but did undertake some minor preparation for defense of the guilt phase. During the prosecution's case-in-chief, defense counsel retained forensic psychiatrist John Stalberg to interview Pinholster and ascertain his state of mind at the time of the homicides. Stalberg conducted a single, brief interview of Pinholster. Stalberg also reviewed a police report and a 1978 probation report about Pinholster, but counsel failed to provide him with the educational, medical, or psychiatric records that he requested before the examination. (PA 177, 266-67.) Stalberg concluded

that Pinholster was not mentally ill. He sent counsel a report of his conclusions. (JA 129-32.) Stalberg never heard back from trial counsel.

a. The Guilt Phase

At trial, the prosecution relied heavily on the testimony of Corona. In exchange for having murder charges against him dropped, Corona testified that he watched in horror as Pinholster and Brown killed the victims and stole their wallets. (PA 4; CT Supp. 158-59.) He said that as Johnson and Beckett came around the house to block their exit, Pinholster went "crazy." He began stabbing and kicking Johnson and then stabbing Beckett. (RT 5003-17.) Corona said that Brown stabbed Johnson in the chest and later bragged that he had "buried the knife to the hilt" in Johnson. (PA 4.)

Pinholster called several witnesses who testified that he remained at the party all evening, where he became severely intoxicated. (PA 313.) Pinholster testified in his own defense with the approval of trial counsel. He admitted to burglarizing the Kumar house before the party. He said that Corona asked him for Kumar's address so that Corona could burglarize the drug dealer's house later. Pinholster testified that he could not have committed the robbery-murders, in which the victims had been stabbed to death, because he used only a gun during the "hundreds" of robberies of drug dealers he had committed over the years. The jury convicted

Pinholster and Brown of two counts of capital murder. (PA 6.)

b. The Penalty Phase

After the verdicts, Pinholster's counsel admitted in open court that they had "not prepared any evidence by way of mitigation" because they believed notice of the prosecution's intent to seek death and present aggravating evidence had not been given. (RT 7250.) The judge overruled the objection, holding that Pinholster himself had received proper, timely notice before counsel were appointed. The judge offered to continue the penalty trial to give counsel time to prepare. Counsel declined the offered continuance, noting that extra time would not "make a great deal of difference." Counsel then spent 6.5 hours preparing for the penalty phase. (PA 8-9.)

During penalty, the prosecution called six members of law enforcement to testify about their interactions with and opinions of Pinholster. Probation Officer Jack Taube testified that Pinholster was a gang member, even though he came from an "upper middle-class type of home." (PA 173.) He stated that, during a violation hearing, Pinholster had a "violent outburst" in which he struck a bailiff. (*Id.*) Police officer David Kaufman characterized Pinholster as "belligerent" and gave his lay opinion that Pinholster had faked an epileptic seizure when arrested for assault. (PA 173-74.) Police officer Ernest Guzman opined that Pinholster had faked an epileptic seizure

during another arrest and reported that he had acted violently at a hospital. (PA 174.) Deputy Sheriff Michael Wilson testified that Pinholster was involved in a racial fight in jail, refused to follow instructions, and struck a correction officer. (PA 174, 286, 409.) Deputy Sheriff Thomas Piggott testified that Pinholster was "one of the two or three most violent inmates" in jail. (PA 408.) Deputy Sheriff Joseph Barrett testified that, following the guilt verdicts, Pinholster said he was so "mad" at Corona for testifying that he wanted to kill him. (PA 175, 409.)

The prosecution also called two lay witnesses. Theodore Mesquita testified that Pinholster cut his arm with a razor during a fistfight. (PA 7.) Pinholster's former wife, Cathy Smith, testified that Pinholster hit and broke her jaw during a seizure, but the prosecutor impeached her with her previous statement that Pinholster was "pulling a fake seizure." (PA 8.)

Trial counsel stipulated that Pinholster sustained a prior conviction for kidnaping with use of a knife. Counsel also stipulated that Pinholster had several disciplinary infractions while in prison. Counsel made this latter stipulation without any investigation of the circumstances of those events. (PA 175.)

Brainard and Dettmar's presentation was far more limited than the prosecution's. They waived opening statement and called only one witness, Pinholster's mother, Burnice Brashear. (PA 175.) She opined that she had always provided a good home and

taken care of all of her children. She inaccurately portrayed Pinholster's siblings as "basically good children." (PA 11, 58.)[2] She conceded that her husband, Bud Brashear, had been "abusive or near abusive" to Pinholster but characterized the physical abuse as "discipline" brought on by Pinholster. (RT 7392-93.) She then discounted the abuse entirely by stressing that Pinholster was presently on friendly terms with his stepfather. (PA 55.)

Brashear testified that as a young child Pinholster was hurt in two car accidents, without any explanation of the significance of his resulting head injuries. (PA 50, 269-70.) She said that elementary school officials diagnosed Pinholster with "perceptive vision," but she claimed Pinholster "did much better" once he was placed in a different classroom. (PA 11, 270.) Brashear testified that Pinholster suffered from epilepsy due to a beating in custody, but counsel failed to explain the impact of epilepsy on him. (PA 11.)

During penalty arguments, the prosecutor noted the lack of mitigation and scoffed at defense counsel's fleeting evidence of epilepsy and head injuries, stressing,

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[2] In reality, Pinholster's older brother, Alvin, was a schizophrenic who at the time of his suicide was facing charges of armed residential burglary, forcible rape and forcible oral copulation. (PA 276.) Pinholster's younger brother Terry suffered from depression and abused drugs, including PCP. Pinholster's half-sister, Tammy, had clinical depression and prior convictions for prostitution and forced oral copulation on a minor. (PA 59.)

"[t]here is no evidence. . . . A doctor [should] have been brought in. Medical records. Something." The prosecutor also argued that Pinholster was "conwise" and learned to fake seizures. (RT 7445.)

The prosecutor questioned the relevance of the "discipline" imposed by Pinholster's stepfather, observing that Pinholster's own mother had testified that Pinholster "came from a good home," was "upper-middle class" and "had many things going for him." (PA 61.) The prosecutor asked rhetorically, "[w]hat mitigating circumstances were presented? Nothing except a mother who loves her son." She concluded by telling the jury that "even the most heinous person ever born, Adolph Hitler, probably had a mother who loved him," and that "it would probably be charitable to refer to [Pinholster] as a member of the human species." (PA 61.)

After two and one-half days of deliberations, the jury returned a death verdict. (PA 12.)

3. The State Habeas Petition

Pinholster's state appeal was denied. (PA 301-433). In 1993, Pinholster filed a state habeas corpus petition alleging ineffective assistance at penalty and requesting an evidentiary hearing. (PA 12.) Specifically, he alleged:

> Trial counsel unreasonably and incompetently failed to recognize, adequately investigate, prepare and present evidence that before, after and at the time of the

> charged offense [Pinholster] suffered from serious neurological, psychological and psychiatric disorders and psychotic ideation. . . . [T]rial counsel unreasonably failed to recognize, adequately investigate, prepare and present evidence that at the time of the offense [Pinholster's] consciousness was significantly impaired secondary to neurological and mood disorders at the time of the homicides.

(RA 158.) The petition alleged that counsel did not "secure readily available school, physician, hospital, jail, Youth Authority, child guidance and other records" that would have revealed Pinholster's and his family members' mental health problems, which, in turn resulted in the failure to "provide said records to mental health professionals." (RA 158.)

The petition alleged that counsel's failure to investigate prejudiced Pinholster because:

> Had trial counsel reasonably investigated, he would have learned that [Pinholster] had a lengthy, well-documented history of profound mental illness. Reasonable investigation would have disclosed that at the time of the offenses, [Pinholster] suffered from bi-polar mood disorder with psychotic features. Additionally, reasonable investigation would have disclosed that at the time of offenses [Pinholster] suffered from severe seizure disorders.

(RA 160.) The petition alleged that Pinholster's mental disabilities were significant because they

"were acting upon [him] at the time of the homicides" and "impl[ied] impaired consciousness and, therefore, the inability to form intent." (RA 170.)

Pinholster submitted the following sworn declarations in support of his well-pleaded claim:

- Trial counsel Harry Brainard declared that "[co-counsel] Dettmar and I did not prepare a case in mitigation" because they believed "there would be no penalty phase." He did not recall interviewing any family members besides Burnice Brashear or attempting to locate Pinholster's school, juvenile or medical records or records of prior placement in a mental health facility. Brainard stipulated to incidents of prior prison misconduct because he felt "obligated" to honor an agreement Dettmar had with the prosecutor even though he had never reviewed Pinholster's custody records and considered the incidents "inadmissible." (JA 186, 201, 202, 214.)

- Paralegal Elizabeth Lynch stated that Brainard retained her approximately two weeks before the start of trial to provide paralegal services and draft pretrial motions. Lynch resigned immediately after learning that Brainard had failed to request a continuance of the penalty trial. (JA 14, CR 49: 8/16/93 State Pet. Ex. 116.)

- James Sussman, counsel for co-defendant Brown, attested that Pinholster's "bizarre" affect and "irrational" behavior at trial caused

him to question Pinholster's competence. (JA 14, CR 49: 8/16/93 State Pet. Ex. 46.)

- Joyce Anderson, who was married to Pinholster's natural father, Garland Pinholster, declared that Garland suffered from depression or violent "moods swings" and had chronic alcohol and substance abuse problems. Two other ex-wives corroborated Anderson's statements. (JA 14, CR 49: 8/16/93 State Pet. Exs. 8, 9, 17.)

- Burnice Brashear declared that her son suffered a "serious head injury" at age 2½ when she ran over his head with her automobile. She stated that just a year later during a second car accident Pinholster's head broke through a windshield. (JA 14, CR 49: 8/16/93 State Pet. Ex. 26.)

- Pinholster's elementary school teacher Lois Rainwater declared that she had referred Pinholster for an evaluation for special education because of his poor academic performance, strange conduct, and inability to relate to his peers. Rainwater suspected the problem was "organic" because of its severity. Pinholster was designated as a good candidate for special education classes but his family moved out of the school district before he could begin them. (JA 14, CR 49: 8/16/93 State Pet. Ex. 19.)

- Pinholster's maternal aunt Lois Fosberg declared that Garland abandoned Burnice, Pinholster and Pinholster's two young brothers to abject poverty. She recalled a young

Pinholster mixing water and flour to get something to eat. Fosberg declared that after Pinholster's mother's second marriage to Bud Brashear, the family's living conditions improved but that Pinholster's mother and stepfather ignored their children. She explained that when Pinholster's maternal grandparents "spanked or disciplined the Pinholster children, Scott always got the worst of it." (JA 14, CR 49: 8/16/93 State Pet. Ex. 98.)

- Pinholster's brother Terry declared that their stepfather frequently "beat" Pinholster with fists or a belt and on at least one occasion with a two-by-four board. Terry recalled that there was so much violence in the house that he dreaded coming home. He added that Pinholster received "the most frequent and violent beatings." Eventually Pinholster left home to escape the beatings. (JA 14, CR 49: 8/16/93 State Pet. Ex. 99.)

- Pinholster's half-sister Tammy Brashear corroborated that Pinholster suffered extensive physical abuse at the hands of his stepfather, declaring that the beatings occurred "as often as several times within one week." She said that Pinholster's mother allowed him to "sleep in the car" to avoid the abuse, but otherwise did nothing to protect her son. (JA 14, CR 49: 8/16/93 State Pet. Ex. 100.)

- Co-defendant Brown declared that as Pinholster's roommate in 1981 he witnessed

Pinholster have a serious seizure. (JA 14, CR 49: 8/16/93 State Pet. Ex. 47.)

- Correctional Officer Allan Crowder, whom the prosecutor claimed Pinholster had threatened to kill during an argument, explained that the threat was overblown and unworthy of even a disciplinary report. (JA 14, CR 49: 8/16/93 State Pet. Ex. 108.)

- Dale Peroutka, senior deputy at the jail where Pinholster was incarcerated before trial, impeached the deputies who testified at Pinholster's penalty trial. Peroutka explained that Pinholster's discipline problems in the jail had been exaggerated and that Pinholster was not an "assaultive person." Based on his own observations and input from other deputy sheriffs, Peroutka had declassified Pinholster from administrative segregation to general population. (JA 14, CR 49: 8/16/93 State Pet. Ex. 112.)

- Lieutenant Thomas Pigott, who despite his trial testimony that Pinholster was "one of the two or three most violent inmates" in the jail, declared that he was aware of and agreed with Sergeant Peroutka's declassification of Pinholster based on the determination that he was not assaultive. (JA 14, CR 49: 8/16/93 State Pet. Ex. 113.)

Pinholster further supported his claim with an extensive declaration from forensic psychiatrist George Woods. Woods opined that Pinholster's actions were the result of a mood disorder that caused him to

engage in "psychotic and grandiose thinking" that interfered with his ability to premeditate and deliberate and prohibited him from forming intent to kill. (RA 238.)

Woods also diagnosed Pinholster with "severe and longstanding seizure disorders." He opined that Pinholster's mixed seizure history included grand mal, complex partial and absence seizures. He explained that complex partial seizures are significant because they cause "repetitive and purposeless movements (automatisms), anger, rage outbursts, disturbances of intellect, hallucinations, involuntary movements, and other bizarre phenomena." (RA 225.) Woods identified "two known major head injuries" that resulted in "[s]erious head trauma in early childhood" as the likely cause of Pinholster's epilepsy. (RA 226.)

Woods buttressed his diagnosis of epilepsy by recounting numerous prior similar diagnoses and prescriptions for anti-seizure medications given by doctors who had examined Pinholster throughout his life and before trial. He also identified Pinholster's abnormal EEG at age nine, his commitment to a mental hospital for five months at age 11, and the documented mental problems of Pinholster's biological father and siblings as further evidence of Pinholster's brain abnormality. (RA 226-30.) All of this evidence was presented to the California Supreme Court with the first state habeas petition.

The State's habeas opposition attacked the credibility of Pinholster's declarations. It argued that Brainard's declarations should be viewed with "skepticism" because he had been disbarred and that co-counsel Dettmar was deceased. (JA 14, CR 49: State Petition Opp. 14.) It argued that Woods' opinion should be given "very little weight" because Woods conducted his mental examination ten years after the offenses. (JA 14, CR 49: State Petition Opp. 15.)

The state supreme court issued an order to show cause (OSC). (PA 13.) Under California law, the issuance of an OSC creates a "cause" and triggers "the state constitutional requirement that the cause be resolved 'in writing with reasons stated.'" *People v. Romero*, 883 P.2d 388, 393 (Cal. 1994). The State filed a return to the OSC, again arguing that Woods was "not credible" and stating that Pinholster did not have epilepsy but instead "feigned" seizures. (JA 14, CR 49: OSC Return 9, 13.) The State explicitly disputed that Brainard and Dettmar had failed to investigate mitigation. It attached the declaration of a government agent who unsuccessfully tried to interview trial counsel but learned that Brainard had been suspended from the practice of law six times before being disbarred in 1990. (JA 14, CR 49: OSC Return Ex. 2.) The State also attached the declaration of defense counsel's investigator, Gordon Sutton, who declared "to the best of his recollection" that he investigated for the penalty trial. (JA 14, CR 49: OSC Return Ex. 1.) Pinholster filed a traverse, in which Sutton declared that he had been mistaken in his

prior declaration and that his investigation had been limited to investigating alibi witnesses for the guilt phase. (JA 14, CR 49: OSC Traverse, Sutton Decl.)

After receiving the State's return and Pinholster's traverse, the state supreme court withdrew its OSC as "improvidently issued" and denied the claim "on the merits" without permitting an evidentiary hearing or discovery. (PA 302.)

4. The Federal Habeas Petition

Pinholster raised the same ineffective-assistance claim in federal court and again requested an evidentiary hearing. The federal petition alleged:

> Counsel unreasonably failed to competently investigate, prepare and present relevant evidence and law in mitigation and/or relevant evidence or law pertinent to the prosecution's case in aggravation. Counsel's failure to investigate potentially mitigating penalty phase evidence prevented the presentation of wealth of mitigating evidence and created a false impression that there was no such evidence.

(RA 46.)

The petition alleged that counsel's "failure to investigate [Pinholster's] background, including [Pinholster's] educational, psychological, social, or familial history, kept from the jury a wealth of mitigating evidence that was readily available." (RA 49.) It alleged that Pinholster suffered "severe head

traumas during early childhood" and suffered from "seizure disorder" and "bipolar mood disorder with psychotic features." (RA 59.)

In support of the federal petition, Pinholster tendered the same declarations and corroborating records that were filed in state court, adding only a new declaration by John Stalberg, the psychiatrist trial counsel had retained to examine Pinholster mid-guilt trial. Stalberg declared that trial counsel had provided him with only a police report and a 1978 probation report. (RA 218.) Upon reviewing educational, medical and psychiatric records that federal habeas counsel provided, Stalberg concluded that there was "voluminous mitigating evidence," including evidence of "repeated head trauma," "brain damage," "a childhood of physical abuse, emotional neglect, and a family history of mental illness and criminal behavior," that could have been presented at trial. (RA 219-20.) Stalberg believed that Pinholster's epilepsy was potentially mitigating because "epileptics are more sensitive to drugs," and "are prone to abnormal behavior" between seizures. (RA 220.) He noted that Pinholster's "bizarre behavior" at the Tapar house just prior to the burglary would have made him inquire further as to whether Pinholster "was under the influence of an extreme emotional disturbance or had an impaired ability to appreciate the criminality of his actions or conform his conduct to the requirements of the law" at the time of the killings. (RA 219-220.) The petition alleged that, if counsel had provided Stalberg with accurate information

about Pinholster's history and his conduct during and just prior to the offenses, Stalberg would have concluded and testified at trial that Pinholster's conduct was influenced by a "strong genetic/hereditary component," "repeated head trauma," and evidence of "brain damage." (RA 62-63.)

Pinholster then filed a second state habeas petition that included the Stalberg declaration and related allegations about trial counsel's failure to properly prepare him for the forensic psychiatric examination. As with the first state petition, the California Supreme Court summarily dismissed the claim "on the merits" without an evidentiary hearing or discovery. (PA 300-01.)

Back in federal court, both parties moved for summary judgment on the claim of ineffective assistance at penalty phase, and Pinholster, in the alternative, moved for an evidentiary hearing. (JA 28, CR 106; JA 31, CR 188; JA 33, CR 125, 126.) The district court granted an evidentiary hearing and authorized pre-hearing discovery. (JA 37, CR 144.)

The State deposed Stalberg, questioning whether a psychiatrist without neurology training was competent to diagnose Pinholster as epileptic or opine on the cause of the epilepsy. The State also challenged the accuracy of Stalberg's opinion that epileptics are prone to impulsivity and violence between seizures and are more sensitive to the effects of drug and alcohol. (Stalberg Deposition Vol. 1, pp. 160-61.) The State tendered its own mental health expert,

Dr. David Rudnick, who diagnosed Pinholster with anti-social personality disorder and denied that Pinholster suffered seizures at the time of the homicides. (JA 50, CR 201: Rudnick Dec.)

Pinholster responded to the State's new attack on his mental health mitigation by calling forensic psychiatrist Sophia Vinogradov and pediatric neurologist Donald Olson to corroborate Stalberg's opinion that Pinholster's epilepsy and intoxication affected his mental state during the crimes. Vinogradov concluded that Pinholster suffered from "personality change, aggressive type, due to serious childhood head trauma." (RA 205.) Olson, who directs the Pediatric Epilepsy Program at Stanford University Medical Center, determined that Pinholster suffered from childhood epilepsy and brain damage, which corroborated Vinogradov's and Stalberg's opinions. (RA 175, 205, 219-20.)

The State moved to preclude Vinogradov and Olson from testifying because their testimony was never presented in state court. (JA 49, CR 192.) Judge Taylor denied the motion in limine without prejudice because he wanted to hear the new experts' entire testimony to determine whether it fundamentally altered the ineffective-assistance claim. (JA 49-50, CR 195.)

5. The Federal Evidentiary Hearing

At the evidentiary hearing, Pinholster called Joyce Anderson, Lois Fosberg, and Lois Rainwater,

each of whom testified about Pinholster's troubled childhood and educational and mental problems consistent with their state-court declarations. *See supra* at 12-13. Keith Baumbach, Pinholster's uncle, was not a state-court declarant,[3] but he testified to many of the incidents that were alleged in the state and federal petitions. Baumbach testified that on numerous occasions he witnessed his mother, Magdalena, physically abuse Pinholster as a young child. Baumbach testified that his sister, Burnice Brashear, hid the fact that Pinholster was on trial for capital murder because she was "embarrassed" and didn't want anybody to know. (JA 52, CR 201, 203, 221.) All of the facts referred to by Baumbach were included in the state-court filings. (JA 14, CR 49: 8/16/93 State Pet. Exs. 8, 9, 98.)

Pinholster called Vinogradov and Olson to opine about his mental health before and at the time of the homicides. Vinogradov testified that Pinholster suffered frontal lobe brain damage as a result of the two car accidents. In the first, Pinholster's mother ran him over with her car when he was two years old, injuring his head, tearing his ear, and driving a bolt through his shoulder. Pinholster was hospitalized for two weeks. In the second, which occurred one year later, Pinholster's mother's car collided with another

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[3] Baumbach testified that he lived out of state and had been estranged from his sisters, Burnice Brashear and Lois Fosberg, for years. (JA 52, CR 221: 9/11/02 EHRT 84, 145.)

car, propelling Pinholster head-first through the windshield. (JA 52, CR 221: 9/12/02 EHRT 37.)

Pinholster's frontal lobe brain damage impaired his impulse control and made him prone to violent outbursts in response to stress. Pinholster's documented behavioral and learning problems in school (including a diagnosis of "academic retardation" by a school psychologist), his abnormal EEG at age 9, his placement in a mental facility for five months at age 11, and his life-long history of seizures and prescribed anti-seizure medications corroborated Vinogradov's opinion that the accidents caused organic brain damage. (RA 173-74, 180, 184, 202, 204-05, 214; JA 52, CR 221: 9/12/02 EHRT 37.)

Vinogradov also testified that Pinholster began sniffing glue at age 10 and progressed to marijuana and heroin at ages 13-14. (RA 185.) She agreed with Stalberg that Pinholster's bizarre conduct at Lisa Tapar's house on the night of the homicides suggested he was severely intoxicated or possibly psychotic. (RA 198, 214.) Finally, she testified that because Pinholster's conduct was affected by organic brain damage it was inappropriate to label him antisocial or psychopathic. (RA 200-01; PA 279; JA 52, CR 221: 9/12/02 EHRT 63, 74.)

Olson conducted an independent review of Pinholster's medical records, including reports of eyewitness accounts of Pinholster's seizures. Olson concluded that Pinholster suffered from brain damage

since at least age five and from epilepsy since at least age nine. (RA 175.)

The State called Stalberg, who was now working as their expert witness. Although he did not waver from his original determination that Pinholster was antisocial, Stalberg confirmed that Pinholster suffered from brain damage and epilepsy and explained that trial counsel never provided him with the readily-available records to determine the nature and extent of Pinholster's mental health history before trial. Stalberg categorized those records as "voluminous mitigation," implying that he would have advised trial counsel and testified at trial accordingly if he had seen the records then. (JA 52, CR 221: 9/10/02 EHRT 111-14) Stalberg also testified that epileptics such as Pinholster are hyper-sensitive to drugs and alcohol and that Pinholster's bizarre conduct at the Tapar house prior to the homicides suggested he was severely intoxicated. (JA 52, CR 221: 9/10/02 EHRT 114, 200.)

The State also called Rudnick, who testified that, contrary to all the other experts, including Stalberg, Pinholster's head trauma in early childhood did not cause epilepsy or brain damage. (JA 50, CR 201: Rudnick Decl.) Rudnick said that Pinholster may have had epilepsy of unknown origin between the ages of 18 and 21, but that he did not have it when he committed the crimes at age 23. (JA 50, CR 201: Rudnick Decl.)

6. The Federal Court Opinions

After the evidentiary hearing, the district court granted relief on penalty ineffective-assistance claim. The court found that trial counsel's presentation at the penalty phase was deficient. (PA 263, 266.) Based on Brainard's contemporaneous in-court admission and habeas declarations, the court found that the failure to present evidence of brain damage and a troubled childhood was due to a lack of preparation, not a strategic decision. (PA 266.) The court also found that counsel failed to investigate evidence of epilepsy, which would have rebutted the prosecution's aggravating evidence. The district court acknowledged that the experts differed over whether Pinholster suffered from antisocial personality disorder, but concluded that even if Pinholster were "antisocial," the extensive evidence of childhood neglect and abuse and mental health problems would have overcome any negative aspect of such a diagnosis. (PA 291-92.) After reweighing the mitigation against the aggravation, and considering the two and one-half days of jury deliberations, the court concluded that, but for counsel's errors, there was a reasonable probability that the outcome of the penalty phase would have been different. (PA 290.)

The district judge explicitly rejected the State's argument that the new experts should not be permitted to testify because they had not been presented in state court. The court found that Pinholster's factual predicate, which Vinogradov and Olson addressed, was the same as what was presented in state court:

> In his state court petition, Pinholster claimed his attorneys were ineffective for failing to investigate and present mitigating evidence regarding his "serious mental impairment," including "organic mental disorders." State Pet. (Lodged Doc. C-1), 184. In support, he offered evidence of his childhood head injuries and beatings, problems in school, abnormal EEG, and epilepsy. *Id.* at 174-185. At the evidentiary hearing before this Court, Drs. Olson and Vinogradov merely elaborated on these factual allegations. Their testimony did not fundamentally alter the substance of Pinholster's claim. If anything, Pinholster's "inability to fully explore [the claim] stemmed from the state courts' refusal to grant him an evidentiary hearing on the matter, rather than from any failure of diligence on his part." *Weaver v. Thompson*, 197 F.3d 359, 364 (9th Cir. 1999). The "legal basis" for the claim "remained unchanged." *Id.*

(PA 296.)

In a separate order, the district court applied the standards of the Antiterrorism and Effective Death Penalty Act ("AEDPA") to Pinholster's case.[4]

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[4] The district judge had initially ruled that AEDPA applied to this case. The Ninth Circuit subsequently held that AEDPA does not apply to cases in which the petitioner requested appointment of counsel prior to the effective date of the Act. *Calderon v. United States District Court (Kelly)*, 163 F.3d 530, 539-40 (9th Cir. 1998). The district court complied with this

(Continued on following page)

Citing and applying *(Michael) Williams v. Taylor*, 529 U.S. 420 (2000), the court found that Pinholster had been diligent in seeking to develop the facts in state court and thus was not barred by § 2254(e)(2) from receiving a federal hearing. It also ruled that § 2254(d)(1) did not apply because the state supreme court did not adjudicate the ineffective-assistance claim. (PA 254-58.)

The Ninth Circuit affirmed the district court in an 8-3 en banc opinion. (PA 1-163. Contrary to the district court, the majority concluded that, under circuit law, § 2254(d)(1) applied to the state supreme court's summary, unreasoned denial of the ineffective-assistance claim. (PA 20-21.) After acknowledging uncertainty amongst the circuit courts whether to apply *de novo* or "independent" review of an unreasoned, summary denial, the majority applied the latter standard and held "that the California Supreme Court's 'postcard' denial of Pinholster's penalty phase ineffective assistance claim constituted an objectively unreasonable application of clearly established federal law in *Strickland*." (PA 68.)[5] Counsel's performance was deficient because they "conducted no investigation into Pinholster's background *at all*, aside from interviewing his mother," (PA 45

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ruling and applied pre-AEDPA standards on whether to hold an evidentiary hearing. After *Woodford v. Garceau*, 538 U.S. 202 (2003), overruled the Ninth Circuit's position, the district judge *sua sponte* reconsidered Pinholster's case under AEDPA.

[5] *Strickland v. Washington*, 466 U.S. 668 (1984).

(emphasis in original)), and the lack of investigation could not be justified as strategic because "they did not expect a penalty phase to occur, and then, out of apparent apathy or neglect, declined a continuance without an informed or strategic basis for doing so." (PA 46.) The unreasonable failure to prepare and present mitigation was prejudicial because reweighing the "evidence in aggravation against the totality of the available mitigating evidence" created a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (PA 24, 47-48.)

The court also affirmed the district court's holding that § 2254(e)(2) did not prohibit a federal evidentiary hearing because Pinholster had been diligent in attempting to develop the facts in state court. The majority noted:

> [E]ven if those [§ 2254(e)(2)] limitations did apply, we find that both the federal and state habeas petitions detail many substantially identical facts, including trial counsel's failure to file a motion for a continuance to prepare a mitigation case for the penalty phase, counsel's introduction of Brashear's testimony, Pinholster's home life as a child, and Pinholster's educational, medical, social and psychological and family background. Although Pinholster substituted experts during the proceedings who ultimately developed different mental impairment theories, these experts nonetheless relied on the same background facts that Pinholster presented

> to the state court. Accordingly, if § 2254(e)(2) were to limit the scope of the evidence before us, it would exclude only the new mental impairment theories introduced in federal court, and their exclusion would not affect our result.

(PA 34-35.)

SUMMARY OF ARGUMENT

The court below correctly found that Pinholster's attorneys were ineffective at penalty. Counsel had been unprepared for the penalty phase, indeed, unaware that a penalty phase was coming. (PA 3.) The evidence presented to the state habeas court showed that had counsel conducted a reasonable investigation they would easily have discovered plentiful and persuasive mitigating evidence. That mitigating evidence included organic brain damage, epilepsy, significant educational deficits, repeated and substantial physical abuse by family members, an extensive family history of mental illness, and commitment to a mental health facility as early as age 11. (PA 271-77.)

Instead of conducting a reasonable investigation, counsel, after preparing just six and one-half hours for penalty, presented one witness, Pinholster's mother, who gave a falsely positive account of Pinholster's upbringing and mental health. (PA 11, 58.) The prosecutor exploited counsel's presentation

in her closing, arguing that counsel had presented nothing serious by way of mitigation. Despite the lack of mitigation presented, the jury deliberated two and one-half days before returning a death verdict. (PA 12.)

The California Supreme Court summarily denied Pinholster's penalty phase ineffective-assistance claim "on the merits" but without an opinion or citation to authority, and without holding an evidentiary hearing or authorizing discovery. (PA 300-01.) The district court granted relief after discovery and a hearing, and the en banc circuit court affirmed. The circuit court correctly concluded that the mitigation presented in habeas "starkly contrasts with the unheard evidence in Pinholster's case: organic brain damage, mental disease, childhood beatings, abandonment, and a nuclear family filled with mental illness and violence." (PA 67-68.)

The State argues the circuit court erred. It claims that Pinholster presented "radically different" facts in state and federal court. (Cert. Petition 11.) The record shows, however, that Pinholster presented the "factual predicate for [his] claim" in state court (Pet. Brief 21), and any differences between the state and federal presentations are legally insignificant.

In state court, Pinholster alleged that "[t]rial counsel unreasonably and incompetently failed to recognize, adequately investigate, prepare and present evidence that before, after and at the time of the charged offense, [Pinholster] suffered from serious neurological, psychological and psychiatric disorders

and psychotic ideation" (RA 158), including "severe seizure disorders." (RA 160.) Supporting declarations filed in state court recounted Pinholster's "serious head injuries" in early childhood and "brain damage," a childhood of physical abuse and emotional neglect, and a family history of mental illness. (JA 14, CR 49: 8/16/93 State Pet. Exs. 19, 26, 98, 99, 100; RA 219-20, 226.)

Likewise, in federal court, Pinholster alleged that trial counsel's "failure to investigate [Pinholster's] background . . . kept from the jury a wealth of mitigating evidence that was readily available"; alleged that Pinholster suffered "severe head traumas during early childhood" and from "seizure disorder"; and submitted an expert declaration attesting to Pinholster's "brain damage." (RA 46, 59, 220.)

Indisputably, both the State and Pinholster added mental health experts as Pinholster's claim moved from state to federal court, and from affidavit to live testimony. But Pinholster presented the same legal theories and core operative facts in state and federal court. Because the record does not support the State's claimed basis for review, certiorari was improvidently granted, and the case should be dismissed. *Cf. Bell v. Kelly*, 129 S. Ct. 393 (2008) (mem.) (per curiam). In the alternative, the Court should affirm the judgment below, which is based on a straightforward and faithful application of this Court's ineffective-assistance and AEDPA precedents.

Trying to avoid the clear direction of this Court's precedent, the State makes a number of proposals on how various AEDPA provisions should be interpreted, but the Court need not reach those arguments to affirm the judgment below. *Cf. Wood v. Allen*, 130 S. Ct. 841, 845, 851 (2010) (declining to reach issues of AEDPA interpretation because their resolution was not necessary to affirm the judgment). The Ninth Circuit granted relief on the basis of the evidence presented in state and federal court, but it also granted relief in the alternative without considering the purported "new mental impairment theories introduced in federal court" about which the State complains. (PA 35.) This Court should affirm that judgment. Pinholster's federal experts merely elaborated on the state and federal allegations of mental illness and cognitive deficits, and focused on the same allegations of "epilepsy," "repeated head trauma" and "evidence of brain damage" that were presented in state court.

The State's AEDPA arguments fail on the merits. The State argues that "when examining whether a state-court rejection of a claim was objectively unreasonable under § 2254(d)(1), a federal court must confine itself to *only* those facts presented to the state court in support of the claim." (Pet. Brief 31 (original emphasis).) This argument is contrary to the plain text of § 2254(d)(1), renders § 2254(e)(2) (AEDPA's evidentiary hearing provision) and the exhaustion doctrine superfluous, and is contrary to this Court's cases interpreting § 2254(d) and (e). Similarly flawed

is the State's argument that a habeas petitioner must prove a state court decision unreasonable under § 2254(d) in order to obtain a federal evidentiary hearing. If a habeas petitioner could show without any further fact development that the state-court denial of his claim was unreasonable, what need would he have for a federal evidentiary hearing? The habeas petitioner would be entitled to relief on the state-court record.

ARGUMENT

I. CONTRARY TO THE STATE'S CLAIM, PINHOLSTER PRESENTED THE SAME LEGAL THEORIES AND CORE OPERATIVE FACTS IN STATE AND FEDERAL COURT

The State asks this Court to rule that federal habeas relief may not be granted on a factual predicate that the habeas petitioner could have presented in state court, but did not. (Pet. Brief 16.) This issue is not presented by Pinholster's case. Contrary to the State's argument, the factual predicate for Pinholster's federal habeas petition was the same as for his state petitions. Because the record does not support the State's claimed basis for review, certiorari was improvidently granted, and the case should be dismissed. *Cf. Bell*, 129 S. Ct. 393.

There is no denying that both the State and Pinholster added mental health experts as

Pinholster's ineffective-assistance claim moved from state court to federal court and from affidavit to live testimony, and they ultimately relied on those experts to litigate mental health claims. After the federal court granted an evidentiary hearing, the State tendered a new mental health expert, and Pinholster responded with additional experts to elaborate on the diagnosis of Pinholster's mental illness. But a comparison of the substance of the experts' opinions presented in state and federal court, and the bases for those experts' diagnoses, supports the lower courts' findings that Pinholster's claims did not change. The State attempts to exploit mere nuances in medical terminology to support its claim. This attempt fails. Pinholster's case does not present the issue the State wants reviewed.

A. In State Court, Pinholster Alleged, And Supported With Declarations, The Claim That His Trial Counsel Failed To Investigate And Present Evidence Of His Organic Disorders And Brain Damage

Pinholster's first state petition alleged that he suffered from "profound mental disorders" and serious mental impairments throughout his life. (RA 160.) The petition specifically pleaded "head traumas during early childhood" as one of the causes for his mental disorders and impairments. (JA 14, CR 52: 8/16/93 State Pet. 182.) Counsel tendered Woods' declaration, which more thoroughly discussed Pinholster's childhood head injuries and opined that

he suffered from both mood and seizure disorders that affected his ability to form specific intent and control his actions during the offenses. (RA 221-50.)

Pinholster's second state petition alleged that trial expert Stalberg "failed to alert trial counsel that [Pinholster's] organic disorders provided a mental state defense" to the charged offenses and aggravators. (RA 111.) The petition alleged that Pinholster's "mental disorders" mitigated the crimes for a variety of reasons. (RA 112.) Pinholster tendered Stalberg's declaration stating that he had made his initial diagnosis without having received any of the educational, medical and psychiatric treatment records that he had requested from counsel. (RA 218-20.) Stalberg declared that he did not know of Pinholster's "irrational and highly aggressive actions immediately before the homicides" (RA 219), which he later explained was a reference to Pinholster's telling the occupants of Tapar's house that he "had a message from God." (JA 232-33.) Stalberg noted that epileptics such as Pinholster "are more sensitive to drugs, have difficulty controlling their behavior and are prone to abnormal behavior between seizures." (RA 220.) After reviewing all of the social history records and learning the relevant facts of the night of the crimes, Stalberg opined that there was a wealth of mitigation to be offered at trial, including "epilepsy," "severe

genetic and mental disorders," "repeated head trauma," and "evidence of brain damage."[6] (RA 219-20.)

B. Pinholster Raised The Same Claim In Federal Court

Although the State asserts that Pinholster completely changed his ineffective-assistance strategy when he moved from state to federal court, the reality is that the federal petition contained the same operative facts presented in the state petitions. In his federal petition, Pinholster presented the same declarants who provided the same information about his background and upbringing that had been presented in state court. Just as he had in the state proceeding, Pinholster emphasized that trial counsel had unreasonably failed to thoroughly investigate his mental state at the time of the homicides in the face of several red flags of serious mental health problems. (RA 4-64.) Just as in state court, the mental health experts identified two serious head injuries during early childhood as the probable cause of Pinholster's longstanding and severe epilepsy. (RA 173-74, 204-05, 219, 226.) And just as in state court, the experts opined that the cognitive deficits associated with epilepsy negatively affected Pinholster's state of mind and conduct at

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[6] The State's repeated assertions, adopted by the Ninth Circuit dissent, that Pinholster never alleged "brain damage" in state court are incorrect. (RA 94, 145, 146, 226.)

the time of the offenses. (RA 174, 181, 215, 219-20, 239-40.)

In response to a new State witness, Rudnick, Pinholster added testimony in the federal hearing from forensic psychiatrist Sophia Vinogradov and pediatric neurologist Donald Olson. These experts, however, focused on the same allegations of "epilepsy," "severe genetic disorders," "repeated head trauma," and "evidence of brain damage" that were presented in state court. (RA 172-217, 218-50.) The minor differences in the new testimony were the natural result of taking live testimony subject to cross-examination and of responding to the opposition's arguments.

In state proceedings, Woods had referred to the "synergistic" effect of substance abuse, mood disorder and seizures, while in federal proceedings Vinogradov referred to the "confluence" of substance abuse, brain damage-related impairments and seizures. (RA 181, 237.) But both focused on how the combination of impairments diminished Pinholster's ability to control his behaviors and form specific intent at the time of the homicides. (RA 215, 237.) The fact that different experts used different but related nomenclature to talk about the same operative facts in support of the same legal theories did not fundamentally alter the claim, circumvent exhaustion, or violate § 2254(d)(1). As the district court found, "Olson and Vinogradov merely elaborated on these factual allegations. Their testimony did not fundamentally alter the substance of Pinholster's claim." (PA 296.)

The en banc court of appeals agreed that the new experts did not change Pinholster's claim. (PA 35.) The court held that, even if it did not consider Vinogradov's diagnosis of "personality change, aggressive type, due to serious childhood head trauma" (RA 205), it still found an unreasonable application of *Strickland* based on counsel's failure to present the evidence of Pinholster's documented history of mental problems and his abusive childhood that was indisputably before the state court. (PA 35, 68.) If Vinogradov's testimony had actually created a new factual predicate for relief, such a statement would be impossible.[7]

Counsel's failure to investigate a capital client's mental health history and troubled childhood is a classic basis for relief based on ineffective assistance. That was the basis of both of Pinholster's state petitions, and it is the basis for his federal petition. From the beginning of his post-conviction proceedings, Pinholster consistently alleged that trial counsel's failure to prepare and present evidence of his troubled childhood and mental health problems resulted in ineffective assistance at penalty. The State does not, and cannot, claim that Pinholster changed his presentation regarding his troubled childhood. The record shows no more than the normal progression of this claim through litigation, from written pleadings

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[7] The State suggests that the en banc majority does not really mean what it says (Pet. Brief 27-28), but that is no basis for review by this Court.

to an adversarial, fact-finding proceeding. That progression did not change the predicate of Pinholster's claim. The State is wrong to claim otherwise. Because there is no basis for consideration of the question presented for review, certiorari should be dismissed as improvidently granted. *Bell*, 129 S.Ct. 393.

II. COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT EVIDENCE OF PINHOLSTER'S TROUBLED CHILDHOOD AND BRAIN DAMAGE WAS INEFFECTIVE ASSISTANCE UNDER THE *WILLIAMS-WIGGINS-ROMPILLA* LINE OF CASES.

The Court set out a two-part test for ineffective assistance in *Strickland*, 466 U.S. at 687-88. It has elaborated on and applied that test to claims of ineffective assistance at penalty in a trilogy of AEDPA cases. *See (Terry) Williams v. Taylor*, 529 U.S. 362, 399 (2000) (holding that state supreme court's denial of ineffective-assistance-at-penalty claim was an "objectively unreasonable" application of *Strickland*); *Wiggins v. Smith*, 539 U.S. 510, 527 (2003) (same); *Rompilla v. Beard*, 545 U.S. 374, 389-90 (2005) (same). The court below applied these cases to the facts of Pinholster's case and determined that Pinholster's counsel had been ineffective. This decision is correct and unremarkable.

The State's brief completely ignores *Wiggins* and *Rompilla* and mentions *(Terry) Williams* only in support of its proposals for reformulating the habeas

statute. The omission is telling. *Williams*, *Wiggins* and *Rompilla* are the relevant substantive precedent, the cases relied upon by the court below, and the cases that teach that the type of failure to investigate that occurred here constitutes ineffective assistance.

The State does not engage these precedents. Instead, it prefers to allege that the court below created a new test for ineffective assistance, one that looks to the American Bar Association ("ABA") standards and requires counsel to churn experts until he hears what he wants. The State's allegations are phantasms. The court below adhered to this Court's clear law, nodded to the ABA standards in a way already approved by this Court, and held that counsel's failures to investigate and provide any expert with the relevant data and records to make a reliable assessment was deficient performance. The performance of Pinholster's trial counsel was deficient and prejudicial and relief was properly granted under AEDPA.

A. Deficient Performance

To establish deficient performance, a "[petitioner] must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The district court held that counsel's failure to adequately investigate Pinholster's social history and mental health problems was unreasonable. The district court was right; its factual findings were not clearly erroneous, the standard for reversing

them on appeal after an evidentiary hearing. *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1421 (2009).

This Court has repeatedly found that the failure to investigate mitigation in a capital case is unreasonable. *(Terry) Williams*, 529 U.S. at 395 (finding deficient performance where counsel "did not begin to prepare for [penalty] until a week before trial" and failed to discover that defendant was "borderline mentally retarded" and had suffered severe abuse and neglect as a child); *Wiggins*, 539 U.S. at 524-34 (finding deficient performance because counsel had only a "rudimentary knowledge" of defendant's life based on a single psychological report, a one-page "personal history" in probation report and Department of Social Services records that lacked information about sexual abuse of client as a child); *Rompilla*, 545 U.S. at 383-90 (finding deficient performance where counsel failed to review court file that would have revealed defendant had organic brain damage and suffered an abusive, neglectful childhood).

Each of the trial counsel in the above cases did far more to prepare for penalty than trial counsel in this case. By their own contemporaneous courtroom admission, Dettmar and Brainard did nothing to prepare prior to the guilt verdicts. They then declined an offered continuance. (RT 7257-80.) They billed 6.5 hours total to prepare for penalty. (PA 263.) Although the dissent in the opinion below posits that counsel called only Brashear to pursue a "family sympathy defense," Brainard's in-court admission

and post-conviction declarations reveal that counsel called her because she was literally the only penalty witness they had interviewed. (JA 188, 201-03, 207, 214.) Brashear falsely testified that she had provided her son with discipline and a good home, then added that her son was essentially incorrigible and justly deserved the harshest of punishments even as a small child. The prosecutor used her testimony to argue that there was no mitigation at all. (RT 7452.)

The State invokes *Strickland*, which was decided contemporaneously with Pinholster's trial, as if the standard for reasonable representation was lower in 1984 than as explained and applied in the trilogy of cases. But Brainard and Dettmar do not benefit from comparison to trial counsel in *Strickland*. In that case, counsel decided to forego certain areas of mitigation investigation because the defendant, who was arrested for one murder but in fact had committed three murders and three more attempted murders, initiated a meeting in custody with the police, confessed to all of his crimes and pled guilty against the advice of counsel. *Strickland*, 466 U.S. at 671. Consequently, counsel concluded his only option was to rely on the judge's professed respect for defendants who accepted responsibility for their crimes. *Id.* at 673.

Here, the district court considered and explicitly rejected the notion that counsel limited their investigation to interviewing Pinholster's mother based on strategic reasons, such as relying on a family sympathy defense or avoiding opening the door to Stalberg's

conclusion that Pinholster was antisocial. Judge Taylor held:

> The record shows counsel's actions were not the result of a reasonable strategic decision. Counsel believed there would be no penalty phase because they had not received notice of the aggravating evidence that the state intended to introduce. After learning of their mistake, counsel elected to proceed without a continuance because they did not think the passage of time "would make a great deal of difference."

(PA 264-65.) The lack of a bona fide strategic reason for failing to investigate Pinholster's childhood and mental health history further evidences counsel's deficient performance. *(Terry) Williams*, 529 U.S. at 394 (noting in discussion of deficient performance that counsel "failed to conduct an investigation that would have uncovered records graphically describing [petitioner's] nightmarish childhood, not because of any strategic reason but because they incorrectly thought that state law barred access to such records").

Rather than honestly grapple with the disconnect between its argument and the *Williams-Wiggins-Rompilla* line, the State and its amici set up a strawman to knock down. They argue that the Ninth Circuit, based on an alleged blanket adoption of the ABA guidelines, created a "'rigid' and hindsight ineffective-assistance rule" that compels counsel in every case to present "bad childhood" evidence, and

then correctly note that such a Procrustean rule would conflict with *Strickland*, which eschews hard-and-fast rules for proper representation. (Pet. Brief 51.) This is an obvious attempt to capitalize on *Bobby v. Van Hook*, 130 S. Ct. 13 (2009) (per curiam), where this Court summarily reversed the Sixth Circuit for holding that counsel in a 1985 trial must comply with ABA guidelines that were not issued until 2003. But the Ninth Circuit did not inflate the importance of the ABA guidelines, and it certainly did not create a *per se* rule that evidence of a bad childhood must be presented in all cases. Rather, it used the more general 1982 ABA standards in effect at the time of trial and stressed: "[W]e make clear, as the Supreme Court has, that such standards do not define reasonable representation, but rather are 'guides to determining what is reasonable.'" (PA 38.)

B. Prejudice

To establish prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The district court found that counsel's failure to prepare for penalty prejudiced Pinholster. (PA 268.) It acknowledged that the aggravation was strong, but noted that the new mitigation was also strong. After re-weighing the totality of the mitigation against the aggravation, it determined that there was a

reasonable probability that but for counsel's errors the outcome would have been different. (PA 269, 290.) This determination fits squarely within this Court's case law finding prejudice at penalty.

The murders in *(Terry) Williams*, *Wiggins* and *Rompilla* were every bit as aggravated, if not more so, than the homicides in this case. Pinholster was convicted of murdering two men who were guarding a marijuana dealer's house. One of the victims sold drugs in the residence before the offenses, and both men ran around the house to the backyard in attempt to ambush people they believed had been stealing the marijuana dealer's drugs. (PA 167-68.) In this respect, the victims in *(Terry) Williams*, *Wiggins* and *Rompilla* were significantly more vulnerable than the victims here.

Although Wiggins was a first-offender, Terry Williams and Rompilla had violent prior convictions rivaling if not exceeding Pinholster's self-reported criminal history, even if Pinholster's boastful testimony is taken at face value.

The mitigation omitted by trial counsel in this case is qualitatively and quantitatively similar to the omitted mitigation in *(Terry) Williams*, *Wiggins* and *Rompilla*. Pinholster presented evidence of a troubled childhood that included neglect, physical abuse, learning disabilities and placement in a mental institution at age 11 with a recommendation that he not be released to the custody of his parents.

Pinholster also presented evidence of epilepsy and frontal lobe brain damage similar to the organic brain damage in *(Terry) Williams*. The Court noted that brain damage was especially important to assessing culpability because "[the defendant's] violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation." *(Terry) Williams*, 529 U.S. at 398.

Counsel's failure to discover and present evidence of Pinholster's brain damage was especially prejudicial because it allowed the prosecutor to argue that there was nothing wrong with Pinholster and that he had "faked" seizures in the past as a way to garner sympathy and lenient treatment. *See Banks v. Dretke*, 540 U.S. 668, 700 (2004) (finding undisclosed evidence material under *Brady*[8] based in part on prosecutor's exploitation of the non-disclosure in closing argument). In addition, several mental health experts (including Stalberg, who was called by the State) testified that epileptics have a heightened response to drugs and alcohol. (PA 278, RA 220.) Severe intoxication at the time of the offense is important to assessing culpability at penalty even if it falls short of a guilt-phase defense. *Cone v. Bell*, 129 S. Ct. 1769, 1785-87 (2009).

The Court's recent decision in *Sears v. Upton*, 130 S. Ct. 3259 (2010) (per curiam), further shows why Pinholster's counsel's failure to investigate brain

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[8] *Brady v. Maryland*, 373 U.S. 83 (1963).

damage prejudiced him at penalty. In *Sears*, trial counsel prepared "one day or less" for the penalty phase and called seven family members who testified that Sears came from a stable, loving home and that the execution of Sears would devastate the family. *Id.* at 3261-62, 3264. The prosecutor argued that Sears' purportedly stable and advantaged background showed there was no mitigation to be offered, and the jury sentenced Sears to death. *Id.* at 3262 n.2.

State habeas counsel conducted a more thorough mitigation investigation that uncovered evidence that Sears had been physically abused as a child, had learning disabilities, and suffered "frontal lobe brain damage" as a result of childhood head injuries. *Sears*, 130 S. Ct. at 3262. The state court found deficient performance but denied relief because it determined that trial counsel's presentation of "some mitigation" rendered it impossible to assess *Strickland* prejudice. *Id.* at 3264-65. This Court vacated and remanded for the state court to reweigh the evidence of Sears' troubled childhood and frontal lobe brain damage against the aggravation presented at trial to determine whether Sears was prejudiced by his counsel's cursory investigation. *Id.* at 3267.

Sears demonstrates that a troubled childhood and frontal lobe brain damage caused by a childhood head injury -- the precise overlooked mitigation in Pinholster's case – are critical to assessing culpability and deciding whether death is the appropriate sentence, even when the defendant has committed an aggravated rape-murder of a young girl. *See also*

Porter v. McCollum, 130 S. Ct. 447, 455 (2009) (per curiam) (in AEDPA case, holding counsel's failure to discover that petitioner "suffered from brain damage that could manifest in impulsive, violent behavior" was prejudicial, and noting that the state court "was not reasonable to discount entirely the effect that [expert] testimony [about brain abnormality] might have on the jury or sentencing judge").

The State cites *Strickland* to support its claim that prejudice should not be found. But *Strickland* reveals, not negates, the prejudice here. When habeas counsel in *Strickland* conducted a thorough mental health investigation, their psychiatrists concluded that the petitioner was not under the influence of "extreme mental or emotional disturbance" at the time of the murders. *Washington v. Strickland*, 693 F.2d 1243, 1248 (5th Cir. 1982). The opposite is true in this case. Vinogradov and Olson testified that Pinholster suffered from epilepsy and brain damage that affected his conduct at the time of the homicides. Stalberg, who was a State witness, testified that Pinholster's epilepsy rendered him more susceptible to the effects of intoxication during the homicides. The experts' finding of brain damage that affected intent and culpability demonstrates the concrete prejudice of counsel's failure to investigate mental health that is absent in *Strickland*.

In the end, the combination of Pinholster's troubled childhood and his frontal lobe brain damage:

> [A]dds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying the undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [the defendant's] culpability," *Wiggins*, 539 U.S. at 538 (quoting *(Terry) Williams*, 529 U.S. at 398), and the likelihood of a different result if the evidence had gone in is "sufficient to undermine the confidence in the outcome" actually reached at sentencing. *Strickland*, 466 U.S. at 694.

Rompilla, 545 U.S. at 393.

III. SECTION 2254(d) POSES NO BARRIER TO A GRANT OF RELIEF

The State devotes a substantial portion of its brief to arguing an array of issues concerning the order in which §§ 2254(d) and (e) ought to apply, the sources and content of the requirements to be satisfied before a federal evidentiary hearing may be held, and the scope of § 2254(d) analysis, if any, to be conducted where a federal court hears material new evidence. (*See* Pet. Brief 21-42.) As demonstrated in the preceding sections, however, nothing in this case

turns on the resolution of any of those issues, and the State's assertions about them are therefore irrelevant.[9] *See Wood*, 130 S. Ct. at 845 (declining "to address the relationship between §§ 2254(d)(2) and (e)(1)" because doing so was unnecessary to disposition of the case); *Smith v. Spisak*, 130 S. Ct. 676, 688 (2010) (noting prisoner's contention that "federal court should not defer to a state court that may not have decided a question," but finding it unnecessary to "decide whether deference under § 2254(d)(1) is required here" because doing so would not affect the outcome); *Rice v. Collins*, 546 U.S. 333, 339 (2006) (noting dispute over applicability of § 2254(d) and (e) in analysis of prisoner's *Batson v. Kentucky*[10] claim, but concluding that, "We need not address that question"); *Holland v. Jackson*, 542 U.S. 649, 653 (2004) (per curiam) (recognizing that, "[w]here new evidence is admitted, some Courts of Appeals have conducted *de novo* review on the theory that there is no relevant state-court determination to which one could defer," but finding court of appeals' decision unsustainable for separate reasons) (emphasis in original).

Because the evidence considered by the lower federal courts (and presently before this Court) is not

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[9] Apart from being irrelevant, the arguments concerning §§ 2254(d) and (e) propounded by the State and its amici are also wrong, as explained briefly below and more thoroughly in the *Amicus Curiae* Brief submitted by the American Civil Liberties Union ("ACLU").

[10] *Batson v. Kentucky*, 476 U.S. 79 (1986).

materially different from the well-pleaded allegations and supporting documents put before the state habeas court, the question under § 2254(d) is – at most – whether the California Supreme Court's summary denial of relief was defective in one or more of the ways enumerated in § 2254(d)(1) or (2).[11] While the

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[11] If the evidence taken at the federal evidentiary hearing *had* materially altered the facts supporting Pinholster's claim, then the applicability of § 2254(d) to the components of that claim would depend upon the results of a comparison of "the merits" as adjudicated by the state court, and the merits of the claim as seen by the federal court in light of the new evidence. Where evidence properly developed in federal court materially affects one or more elements of a claim – *e.g.*, the reasonableness of counsel's decisions, or the likely effect of mitigating evidence not put before the jury – § 2254(d) cannot apply because the version of "the merits" adjudicated by the state court in the absence of that evidence is no longer relevant. *See Holland*, *supra*; *Winston v. Kelly*, 592 F.3d 535, 555-56 (4th Cir. 2010) *petition for cert. filed*, 78 U.S.L.W. 3715 (U.S. May 21, 2010 and May 24, 2010) ("If the record evidence after the hearing is substantially the same as the evidence presented to the state court, [§ 2254(d)(2) can apply]. . . . When, however, the petitioner offers . . . new, material evidence that the state court could have considered had it permitted further development of the facts, an assessment under § 2254(d) may be inappropriate. . . . If the [state court] record ultimately proves to be incomplete, deference to the state court's judgment would be inappropriate because judgment on a materially incomplete record is not an adjudication on the merits for purposes of § 2254(d)."); *Wilson v. Workman*, 577 F.3d 1284, 1290-91 (10th Cir. 2009) (*en banc*) ("We hold that when the state court makes . . . findings on an incomplete record, it has not made an adjudication on the merits to which we owe any deference. . . . If the state court fails to consider the very evidence that the claim is based upon, then the state court has not adjudicated the merits of the claim."); *Wilson v. Mazzuca* 570 F.3d 490, 500 n.8 (2d Cir. 2009) (recognizing a "narrow

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state court's failure to explain its decision forestalls most of the inquiries necessary to answering that question,[12] the information that is available

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sphere" of cases where "the state court's unjustified failure to permit adequate development of the factual record may warrant *de novo* review"); *Brown v. Smith*, 551 F.3d 424, 437 (6th Cir. 2008) (applying *de novo* review to new evidence "whenever the reviewing state court improperly limits the scope of its review when considering a [petitioner's] federal constitutional claim"); *Bryan v. Mullin*, 335 F.3d 1207, 1215-16 (10th Cir. 2003) (applying *de novo* review to claims where new evidence was introduced in federal court when the state-court findings were made on an incomplete record).

[12] For example, the state court's summary order fails to indicate: whether both the deficient performance and prejudice components of Pinholster's claim were adjudicated on their merits, *see, e.g.*, *Porter*, 130 S. Ct. at 452 ("Because the state court did not decide whether Porter's counsel was deficient, we review this element of Porter's *Strickland* claim *de novo*."); how the court might have assessed the reasonableness of trial counsel's performance with regard to penalty phase preparation, *see, e.g.*, *Rompilla*, 545 U.S. at 389 (explaining that state court "conclusion" as to trial counsel's performance "fails to answer the considerations we have set out, to the point of being an objectively unreasonable conclusion"); and whether (and if so how) the state court gave consideration to the potential effects of the evidence overlooked by trial counsel on the jury's penalty verdict, *see, e.g.*, *Porter*, 130 S. Ct. at 454 (explaining that § 2254(d)(1) authorized relief because the "Florida Supreme Court either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing"). This lack of susceptibility to review under § 2254(d) would justify withholding application of that provision altogether on the basis that the statute simply cannot accommodate wholly unexplained state court decisions. *See Harrington v. Richter*, No. 09-587, Amicus Curiae Brief of National Association of Criminal Defense Lawyers.

establishes that the California Supreme Court's decision was contrary to, or involved an unreasonable application of, this Court's ineffective assistance of counsel jurisprudence.

As explained in the State's brief, state law obligated the California Supreme Court to assume the truth of the allegations put forth by Pinholster, and then to determine whether those allegations amounted to a *prima facie* case of ineffective assistance of counsel. (Pet. Brief 36 (quoting *People v. Duvall*, 886 P.2d 1252, 1258-59 (Cal. 1995)).) Given the detailed allegations and supporting documents that were before it, the state court would thus have been required to assume, *inter alia*, that trial counsel erroneously proceeded as if there would be no penalty phase for which to prepare, interviewed only one witness during 6.5 hours of penalty phase-related work, failed to fulfill Dr. Stalberg's request for pertinent background materials, and lacked a strategic basis for any of these omissions, and for declining the court's offer of a continuance to facilitate better preparation. (PA 8 9, 175, 266-67; RT 7250.) The state court was further required to assume the truth of Pinholster's allegations concerning the available mitigating evidence, *e.g.*, that he suffered at least two significant head injuries resulting in frontal lobe damage, epilepsy and chronic seizures, that this brain disorder made him more susceptible to the effects of drugs and alcohol and led to periods of psychosis, and that, as a child, he endured physical abuse, neglect and institutionalization. (RA 219-20, 225, 231.)

By any rational measure, the well-pleaded allegations Pinholster presented to the California Supreme Court, if taken as *true*, easily constituted a *prima facie* case of deficient performance and prejudice under the rule of *Strickland*. While the state court's order does not disclose precisely how or why it failed to reach that conclusion, there are only a few plausible explanations. The state court may have misconceived the legal standard governing Pinholster's claim, such that the omissions by trial counsel could be seen as reasonable, or the undeveloped evidence could be regarded as insufficient to have influenced the outcome at trial. In that case, the state court's decision would have been "contrary to" this Court's precedents. Alternatively, the state court may have known the claim was governed by *Strickland*, but failed to recognize or acknowledge the conclusions dictated by Pinholster's evidence under that standard. In that case, the state court's decision would have "involved an unreasonable application of clearly established Federal law."

Whatever the actual explanation, the California Supreme Court's determination that Pinholster's allegations, taken as true, failed even to make out a *prima facie* claim was not only wrong, it was objectively unreasonable. It follows that § 2254(d) does not prohibit a grant of relief on the ground that trial counsel rendered constitutionally ineffective assistance at the penalty phase of Pinholster's capital trial.

IV. THE STATE'S INTERPRETATION OF § 2254(d)(1) IS FUNDAMENTALLY FLAWED

The State advances several novel interpretations of § 2254 (d)(1) that, if accepted, would lead to irrational results and unintended conflicts and confusion in habeas law. As shown above, the Court need not resolve any of the AEDPA issues raised by the State to affirm the judgment. Pinholster nevertheless briefly responds to the State's proposal here. The amicus brief by the ACLU more fully addresses issues of AEDPA interpretation.

A. The State's Interpretation Of § 2254(d)(1) Is Contrary To The Plain Language Of The Statute, Renders § 2254(e)(2) And The Exhaustion Doctrine Superfluous, And Is Contrary To This Court's Caselaw

The State argues that § 2254(d)(1) prevents a habeas petitioner from presenting any new evidence in federal court because only evidence first presented in state court is relevant to assessing the reasonableness of state-court decisions challenged as "contrary to" or "an unreasonable application" of federal law. (Pet. Brief 22.)[13] Petitioner's argument is meritless for three reasons.

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[13] The State overstates AEDPA's restrictions on the authority of a federal court to expand the record and consider new evidence. The Court has considered state-court decisions to be objectively unreasonable after considering evidence presented

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First, as the Ninth Circuit correctly concluded, Petitioner's argument is refuted by the text of § 2254(d)(1). (PA 27-34.) "As with any question of statutory interpretation, our analysis begins with the plain language of the statute. . . . It is well established that, when the statutory language is plain, we must enforce it according to its terms." *Jimenez v. Quarterman*, 129 S. Ct. 681, 685 (2009); (Pet. Brief 23.)

The plain language of § 2254(d)(1) does not limit the federal court to the state-court record. The provision states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

28 U.S.C. § 2254(d)(1) (West 2010)

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for the first time in federal court. *Miller-El v. Dretke*, 545 U.S. 231, 240-41 (2005) (considering new evidence of jury sample to assess claim of racial discrimination during jury selection); *Schriro v. Landrigan*, 550 U.S. 465, 472 (2007) (noting without criticism that the district court "expand[ed] the record" to include mitigation evidence to assess *Strickland* claim).

In support of its counter-textual argument, the State cites Congress' passage of AEDPA as evidence of its intent to "channel" habeas decision-making to state courts. (Pet. Brief 25.) But even assuming such an intent, Petitioner's reading of (d)(1) conflicts with the text of the provision, and the Court "cannot replace the actual text with speculation as to Congress' intent." *Maguwood v. Patterson*, 130 S. Ct. 2788, 2798 (2010).

A comparison of § 2254(d)(1) with its companion provision § 2254(d)(2) further refutes Petitioner's argument. Whereas § 2254(d)(1) has no mention of the state-court record, § 2254(d)(2) provides that a petitioner challenging a state factual determination cannot obtain relief unless the state adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." The Ninth Circuit correctly found it significant that "Congress omitted [the phrase] 'in light of the evidence presented in the State court proceeding' from § 2254(d)(1), while including that language in § 2254(d)(2)." (PA 29.) The court properly concluded that "[t]his omission strongly indicates that Congress did not intend to restrict the inquiry under § 2254(d)(1) only to the evidence introduced in the state habeas court, or to have federal courts imply any such restriction." *Id.*; *see Bates v. United States*, 522 U.S. 23, 29-30 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is

generally presumed that Congress acts intentionally in the disparate inclusion or exclusion.") (Internal citations and quotations omitted.)

The State argues that there is no reason under AEDPA to treat fact-finding differently than legal reasoning, but the omission of the phrase "in light of the evidence presented in the State Court proceeding" in § 2254(d)(1), juxtaposed with its inclusion in § 2254(d)(2), suggests that Congress intended to treat post-conviction attacks on legal holdings differently than attacks on factual findings. This Court has also treated challenges under the two subsections differently. *See Collins*, 546 U.S. at 342 ("The question whether a state court errs in determining the facts is a different question from whether it errs in applying the law.").

The State tries to escape the plain language of § 2254(d)(1) by selectively quoting from *Holland*, 542 U.S. 649. In *Holland*, the Court refused to consider the affidavit of Martha Gooch, who impeached the prosecution's star eyewitness, in analyzing an ineffective-assistance claim because the affidavit had never been presented to the state court. The Court wrote, "[i]n this and related contexts we have made clear that whether a state court's decision was unreasonable must be assessed in light of the record the court had before it." *Id.* at 652. The Court did not suggest that the state-court record was the sole consideration in assessing reasonableness or that it is improper to consider additional factors, including newly developed evidence that is before the court. Moreover, a fair

reading of *Holland* makes clear that the Court refused to consider Gooch's affidavit because the habeas petitioner never explained why he had not presented Gooch's testimony at the two-day evidentiary hearing in state court, resulting in a finding that the petitioner was not diligent. Citing *(Michael) Williams*, the Court stressed, "[u]nder the habeas statute, Gooch's statement could have been the subject of an evidentiary hearing by the District Court, but only if [the petitioner] was not at fault in failing to develop that evidence in state court." *Id.* at 652-53. This shows that the Court was applying traditional AEDPA principles, not radically restricting the analysis of reasonableness in all § 2254(d)(1) claims to solely what was presented in state court.

The second reason the State's argument fails is because its reading of (d)(1) renders § 2254(e)(2), also enacted as part of AEDPA, superfluous, and is contrary to this Court's cases interpreting (e)(2).

In *Landrigan*, 550 U.S. at 468, this Court held that AEDPA does not alter a district court's discretion to hold an evidentiary hearing if a hearing is not barred by 28 U.S.C. § 2254(e)(2). The State's reading of § 2254(d)(1) contradicts *Landrigan* and would render § 2254(e)(2) superfluous. Under § 2254(e)(2), a petitioner who "failed to develop the factual basis of a claim in State court proceedings" cannot receive a federal hearing absent specific circumstances set forth in subsections (A) and (B). But according to the State, § 2254(d)(1) already imposes a wholesale prohibition on federal evidentiary hearings because

its analysis of unreasonableness is strictly limited to the existing state-court record. If this reading of § 2254(d)(1) were correct, there would be no need for further explicit limitations on the right to an evidentiary hearing in federal court. Congress' inclusion of § 2254(e)(2) in AEDPA and this Court's case law interpreting the provision refute Petitioner's interpretation of § 2254(d)(1).

The State's argument also runs aground on the shoals of *(Michael) Williams v. Taylor*, 529 U.S. 420, the hallmark case on federal evidentiary hearings in the AEDPA era. In *(Michael) Williams*, the Court held that a federal court may properly hold an evidentiary hearing if a habeas petitioner diligently tried to develop the facts in state court, even if his efforts were ultimately unsuccessful. Williams did not know of or raise his claims of juror bias, prosecutorial misconduct and a *Brady* violation until he filed his federal habeas petition. Because the 120-day deadline to file a state petition had passed, the district court granted an evidentiary hearing on the claims. *Id.* at 427, 443. The Commonwealth argued that § 2254(e)(2) prohibited a federal hearing on these claims because Williams had "failed to develop" them in state court. *Id.* at 428. This Court, however, found that § 2254(e)(2) does not preclude a hearing if the petitioner was not at fault for failing to develop the facts in state court. *Id.* at 432.

The Court found that Williams was not at fault for failing to discover the basis for two of the three

claims (juror concealment and prosecutorial misconduct) and remanded for a hearing on those claims. The Court noted, "[d]iligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *(Michael) Williams*, 529 U.S. at 437.

The unfairness that would result from adopting the State's proposal is shown in Pinholster's case. Pinholster was just as diligent as Williams in trying to develop his claims in state court. (PA 33-34.) He requested a hearing on his ineffective-assistance claim. (JA 14: CR 49 8/16/93, State Pet. 245; 8/29/97 State Pet. 165-66.) Unlike the State, which relied on conclusory denials, Pinholster made specific allegations about counsel's failure to prepare and the mitigation that would have been discovered if counsel had conducted a reasonable investigation. He submitted affidavits and corroborating records in support of his claim. Given that California at that time authorized habeas counsel to incur "up to $3,000 for habeas corpus investigation relating to a death penalty judgment," *see* Cal. Supreme Court Policies Regarding Cases Arising From Judgments of Death, Policy 2-2.3 (West 2010), Pinholster presented as much evidence as could be reasonably expected in light of the funding limitations and his inability to know with specificity how the State would oppose his mental health evidence.

Using *(Michael) Williams* as the standard, the district court found that Pinholster diligently attempted to develop the facts in state court. (PA 254-58.) The

court's factual finding of diligence is entitled to deference unless it is clearly erroneous. *Hall v. Head*, 310 F.3d 683, 697-98 (11th Cir. 2002). The State has never even addressed this finding, much less shown that it is clearly erroneous.

The third reason the State's (d)(1) argument fails is because its interpretation effectively eliminates the exhaustion doctrine. Before and since the enactment of AEDPA, the exhaustion rule has been the tool used by federal habeas courts to ensure that federal petitioners present the substance of their claim in state court before the federal court can adjudicate the claim in the habeas petitioner's favor. *See* 28 U.S.C. § 2254(b)(1). While the exhaustion doctrine requires that the "substance" of a federal claim must first be "fairly presented to the state courts," *Picard v. Connor*, 404 U.S. 270, 275 (1971), it has never wholly precluded any new evidence in federal court. The State would effectively abolish the exhaustion doctrine in challenges brought under (d)(1), and replace it with an absolute ban on presenting any new evidence in federal court, even if the substance of the claim was fairly presented in state court.

There is no support for the State's proposal in the text or legislative history of AEDPA. Courts assume that Congress is aware of existing law when it passes legislation, *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990), and the exhaustion doctrine predates AEDPA. *See, e.g., Vasquez v. Hillery*, 474 U.S. 254 (1986). The text of AEDPA does not abolish the exhaustion doctrine. To the contrary, the changes to

§ 2254(b)(1) made by AEDPA expressly incorporate the exhaustion doctrine, stating the general rule that a federal writ "shall not be granted unless it appears that – (A) the applicant has exhausted the remedies available in the courts of the State . . . " AEDPA also added the provision that "[a] State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." Far from eliminating the exhaustion rule, AEDPA embraces it.

Prior to AEDPA, this Court rejected a similar argument that a habeas petitioner was barred by the exhaustion rule from presenting any additional evidence in federal court in support of a claim that had been summarily denied by the state court. *Hillery*, 474 U.S. at 260. In *Hillery*, the petitioner submitted "new affidavits" and a statistical expert in response to the district court's request for further information relevant to his claim that the state violated equal protection by systematically excluding Blacks from the grand jury that indicted him. *Id.* at 258-59. The state objected to the consideration of new affidavits and expert testimony in federal court as circumventing the exhaustion requirement. This Court noted that it had "never held that presentation of additional facts to the district court, pursuant to the court's directions, evades the exhaustion requirement when the prisoner has presented the substance of his claim to the state courts." *Id.* at 257-58. Noting that Habeas Corpus Rule 7(b) permits a

district court to expand the existing record, the Court rejected the state's objection and considered all the new affidavits and the expert opinion because "supplemental evidence presented by [Hillery] did not fundamentally alter the legal claim already considered by the state courts." *Id.* at 260.

The State's reading of § 2254(d)(1) would supersede the traditional exhaustion doctrine and, contrary to *Hillery*, prohibit the introduction of any new evidence whatsoever in federal court. Thus, an unreasoned, summary denial of the claim, made after refusing a habeas petitioner's request for an evidentiary hearing, would freeze the body of evidence that may be considered in federal court to that which was before the state court, even when the petitioner was diligent under § 2254(e)(2). Although AEDPA was enacted fourteen years ago, no court has ever interpreted § 2254(d) to supersede the traditional exhaustion principles, including its allowance of new evidence in federal court that does not fundamentally alter the claim. If Congress intended for § 2254(d) to implicitly supersede exhaustion principles, it would not have codified the exhaustion rule in enacting AEDPA, or added the rule regarding a state's waiver of exhaustion. *See* § 2254(b).

B. The State's Argument That A Habeas Petitioner Must Prove That The State Decision Was Unreasonable Under § 2254(d)(1) In Order To Receive A Federal Evidentiary Hearing Under (e)(2) Is Contrary To This Court's Caselaw And Illogical

The State also faults the district court for holding an evidentiary hearing without first concluding that the California Supreme Court acted unreasonably in summarily dismissing Pinholster's ineffective-assistance claim. (Pet. Brief 38.) The State does not, and cannot, cite one case in which this Court held that a determination that a state court's adjudication of a claim was objectively unreasonable under § 2254(d)(1) is a necessary prerequisite to receiving a federal evidentiary hearing.

This Court flatly rejected an identical reading of § 2254(d)(1) in *Wellons v. Hall*, 130 S. Ct. 727 (2010) (per curiam). In *Wellons*, the petitioner alleged that it was a due process violation for the bailiff to receive breast-shaped chocolates and for the judge to receive penis-shaped chocolates from the jury deliberating in a rape-murder capital trial. The state court denied the due process claims without a hearing. Just as the State does here, the State of Georgia argued that the district court was not permitted to hold an evidentiary hearing unless it had first determined that the state court's summary denial of the claim was objectively unreasonable. *Id.* at 729.

The majority rejected this view of AEDPA, writing:

> Indeed, it would be bizarre if a federal court had to defer to state-court factual findings, made without any evidentiary record, in order to decide whether it could create an evidentiary record to decide whether the factual finding were erroneous. If that were the case, then almost no habeas petitioner could ever get an evidentiary hearing: So long as the state court found a fact that the petitioner was trying to disprove through the presentation of evidence, then there could be no hearing. AEDPA does not require such a crabbed and illogical approach to habeas procedures.

Id. at 730 n.3. The Court added that the circuit court's "discussion of the deference owed under" AEDPA to the state-court decision "is the classic formulation of a decision of whether to grant habeas relief," not whether to grant an evidentiary hearing. *Id.* The State's proposal directly conflicts with *Wellons*, *(Michael) Williams*, and *Landrigan*, 550 U.S. at 474 (stating that "a federal court must take into account [the § 2254(d)] standards in deciding whether an evidentiary hearing is appropriate," not conclude that the state-court decision was unreasonable under § 2254(d) before granting a hearing, as the State would have it).

The State and amicus Criminal Justice Legal Foundation cite *Teague v. Lane*, 489 U.S. 288 (1989), as support for their proposal that federal courts

should be required to analyze the reasonableness of the state-court decision before deciding whether to hold an evidentiary hearing. (Pet. Brief 39.) While the Court has sometimes used by analogy the non-retroactivity language of *Teague* to address whether a claim is based on "clearly established federal law," it has never suggested that *Teague* should control the order of decision-making under § 2254(d)(1).

The absence of any true authority in support of the State's proposal is not happenstance. If a habeas petitioner could demonstrate without any further fact development that the state court's denial of his claim was objectively unreasonable, what need would he have for a federal evidentiary hearing? The petitioner would be entitled to relief on the extant state-court record. This is a fundamental flaw in the State's unorthodox reading of AEDPA. The interpretation, if accepted, would require every habeas petitioner to actually win his case before being entitled to receive an evidentiary hearing on it. AEDPA does not compel such a nonsensical result.

CONCLUSION

For all the above reasons, this Court should affirm the judgment of the Ninth Circuit.

Respectfully submitted,

DATED: Sept. 20, 2010

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REPLY BRIEF

No. 09-1088

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In The Supreme Court of the United States

VINCENT CULLEN, Acting Warden
of the California State Prison at San Quentin,

Petitioner,

v

SCOTT LYNN PINHOLSTER,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

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REPLY BRIEF

The Antiterrorism and Effective Death Penalty Act of 1996 mandated a fundamental change in the attitude of the federal habeas corpus courts toward state-court determinations of federal constitutional claims. Gone are the days when a federal court could substitute its own independent de novo judgment regarding a claim's validity. Following the AEDPA reforms in 28 U.S.C. § 2254(d), a federal court may not grant relief unless the state-court decision was not only wrong but also "unreasonable."

The Ninth Circuit violated § 2254(d) in two fundamental ways. First, it deemed the California Supreme Court decision to be "unreasonable" under § 2254(d)(1) on the basis of facts and evidence respondent never presented to the state court. This approach is antithetical to the deference to the state-court decision that Congress has mandated. See *Uttecht* v. *Brown*, 551 U.S. 1, 10 (2001). The State's argument that the Ninth Circuit erred is supported by the plain language of § 2254(d) as well as this Court's consistent recognition that whether a decision was "reasonable" is logically determined by what was known to the decision-maker at the time the decision was made.

The Ninth Circuit also erred by substituting its own view of the validity of respondent's ineffective-counsel claim rather than deferring to the California Supreme Court's reasonable rejection of the claim. The state habeas corpus record established that trial counsel had respondent examined by a qualified psychiatrist, who reported that respondent suffered

from no mitigating mental defects. It also established that trial counsel investigated and presented evidence of respondent's family and social background. It thus supported a reasonable conclusion, under the clearly-established federal law that bound the state court, that trial counsel acted as a reasonably diligent advocate under prevailing professional norms. And, given the severity of the crimes and the meager alternative case in mitigation that respondent offered, nothing in the state-court record compelled the California Supreme Court to conclude that respondent was prejudiced by counsel's purported deficiencies.

Respondent's contrary arguments are based on three fallacies. First, respondent asserts that there was no difference between his claim as presented in state court and the claim upon which the federal court granted relief. However, the Ninth Circuit acknowledged, and its opinion made manifest, that it was relying on new evidence in support of facts never presented to the state court in condemning the state-court determination as unreasonable.

Second, respondent and his amici argue that the Ninth Circuit's reliance on new facts is somehow consistent with the AEDPA statutory scheme. In their view, § 2254(d)(1) deference must be discarded because the claim transformed in federal court was no longer the claim that the state court rejected. But respondent's and amici's plan for do-it-yourself circumvention of deferential review would make a mockery of AEDPA's central habeas corpus reform.

Instead, § 2254(d) requires that the state-court merits decision must always be respected and reviewed for unreasonableness under clearly established law before habeas corpus relief may be granted. So the logical conclusion to be drawn from § 2254(d)(1) is the opposite of that drawn by respondent and his amici. Indeed, to avoid waste and to avoid undermining deferential review, resolution of the § 2254(d)(1) reasonableness question—in this Court's words, the "only question that matters"—should precede any de novo review of the claim presented to the state court, and certainly any presentation of evidence to prove new facts in the federal proceedings

Third, in pressing his substantive claim of ineffective counsel, as noted, respondent ignores the fact that well before the penalty phase trial, counsel hired a qualified psychiatrist who examined respondent and who, without any hint of limitation on his ability to give a complete diagnosis, reported that respondent suffered from no mitigating mental disease, defect, or disability. But, the California Supreme Court was not compelled to ignore this fact. Nor was the state court required to ignore the fact that trial counsel investigated and presented background and family evidence. Finally, the state court was not required to minimize the aggravating nature of respondent's crimes when assessing the potential for prejudice from trial counsel's purported deficiencies.

I. THIS COURT NEED NOT RECONSIDER RESPONDENT'S ARGUMENT AGAINST GRANTING CERTIORARI

Respondent argues that this Court should dismiss certiorari as improvidently granted because "the factual predicate for Pinholster's federal habeas petition was the same as for his state petitions." Brief for Respondent (Resp. Brf.) at 32-38. However, respondent made this argument in opposing certiorari, Cert. Opp. at 19-24, and when this Court granted certiorari, it "necessarily considered and rejected that contention as a basis for denying review." *United States* v. *Williams*, 504 U.S. 36, 40 (1992). Respondent has presented no basis for revisiting this already-rejected argument.

The allegations of fact presented to the California Supreme Court and the facts upon which the federal court predicated its decision to grant relief were fundamentally different. In his state habeas corpus petitions, respondent alleged that he "was substantially impaired by a bipolar mood disorder operating synergistically with seizure disorder at the time the crime was committed," and that "[a]t the time of the offenses, [respondent's] disorders impaired his capacity to appreciate the criminality of his conduct and/or to conform his conduct to the requirements of law." RA 142, 170. The expert witnesses respondent presented at the federal evidentiary hearing, however, testified that respondent did not have bipolar mood

disorder, and they were adamant that respondent was not in the throes of a seizure while he was stabbing his victims. Rather, according to the new experts, respondent suffers from organic brain damage that caused him (apparently for the only time in his entire life) to fly into an uncontrollable rage during which he murdered his victims. RA 197, Ninth Circuit Excerpts of Record (9th Cir. ER) vol. 5 at 1298, 1358, see District Court Evidentiary Hearing Reporter's Transcript (EH RT) of 9/10/2002, dkt. no. 221 at 82-83.

Tellingly, respondent points to no place in either of his state habeas corpus petitions where he alleged that trial counsel had erred in failing to investigate and discover that respondent was in the throes of a brain-damage-induced homicidal rage at the time of his crimes. Neither of respondent's experts in the California Supreme Court, Drs. George Woods and Irving Stalberg, diagnosed respondent with brain damage, and Dr. Stalberg at no point ever withdrew his 1984 diagnosis, set out in his report to trial counsel, that respondent was cognitively intact upon examination and did not appear to have brain damage.[1]

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[1] Respondent points to Dr. Stalberg's vague declaration in support of the second state habeas petition which avers that he would have made "further inquiry" into the question of possible organicity had he been aware of respondent's history. Resp. Brf. at 35 n.6. Nowhere, however, did Dr. Stalberg opine that respondent suffered from organic brain damage. RA 218-20. The

(Continued on following page)

By making this unsupportable argument, respondent parts company with the opinion below. The Ninth Circuit acknowledged that it was relying on new evidence in support of new facts. It held that "Congress did not intend to restrict inquiry under § 2254(d)(1) only to evidence introduced in the state habeas court, or to have federal courts imply any such restriction." PA 29. Further, the Ninth Circuit held, "[w]e conclude that the mitigation evidence introduced at the federal evidentiary hearing is properly before us in considering Pinholster's penalty phase ineffective assistance claim." PA 35. And the Ninth Circuit relied upon a lengthy recital of new facts adduced from new evidence only ever presented in federal court in support of its ruling. PA 50-54. Respondent's stubborn refusal to acknowledge what occurred in the Ninth Circuit, and explain how it comports with the law, is a tacit admission that the Ninth Circuit's reliance on the new facts to grant relief was indefensible

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California Supreme Court was not required to speculatively presume that respondent suffered from organic brain damage, when respondent never alleged such was the case in either of his state court petitions, and no expert he presented to the California Supreme Court ever so opined It is ironic that respondent relies on Dr Stalberg for this point, given Dr Stalberg's testimony at the federal evidentiary hearing that, upon the "further inquiry" vaguely alluded to in the declaration, nothing he saw caused him to doubt his original diagnosis that respondent is simply a psychopath 9th Cir ER vol 4 at 976

II. PROPER § 2254(d)(1) DEFERENCE REQUIRES EXAMINING THE REASONABLENESS OF THE STATE-COURT DECISION IN LIGHT OF THE FACTUAL BASIS FOR THE CLAIM PRESENTED TO THE STATE COURT

A The plain language of § 2254(d)(1) requires that the state-court determination be reviewed in light of the factual basis for the claim presented to the state court. Any other interpretation of the statute does violence to the entire purpose of § 2254(d) and to the well-settled definition of "unreasonable," as this Court has defined that term Respondent would have this Court conclude that, because Congress did not employ additional language reiterating that reasonableness depends on the facts known to the decision-maker at the time the decision was made, this Court must read the "unreasonableness" limitation out of the statute entirely

But at the time Congress passed AEDPA, it was firmly established that whether a decision was "reasonable" was determined in light of the facts known to the decision-maker at the time the decision was made. See *Graham* v *Connor*, 490 U.S. 386, 396-97 (1989); *Strickland* v *Washington*, 466 U.S. 668, 690-91 (1984), *Scott* v. *United States*, 436 U.S. 128, 137-38 (1978) Well-settled principles of statutory construction require an interpreting court to conclude that Congress was using the term in the same sense as it had previously been interpreted by this Court *United States* v. *Noland*, 517 U.S 535, 539 (1996). In this

specific context, such a reading requires an interpreting court to conclude that when Congress used the term "unreasonable," it meant what this Court said it meant in *Graham*, *Strickland*, and *Scott*: that is, unreasonable in light of what was known to the decision-maker at the time the decision was made.

Respondent's contrary interpretation violates this principle of statutory construction. Indeed, under respondent's interpretation, the term "unreasonable" means what this Court has repeatedly held it does *not* mean. As this Court has instructed, the question under § 2254(d)(1) is not whether the state-court decision was correct, but whether it was reasonable. *Renico* v. *Lett*, 130 S. Ct. 1855, 1866 (2010); *Yarborough* v. *Alvarado*, 541 U.S. 652, 665 (2004). But, as even respondent recognizes, Resp. Brf. at 50-51 n.11, once new facts never presented to the state court are considered, the federal court is no longer considering the claim presented to the state court. Introducing facts that were never before the state court into the analysis changes the question to whether the state court was correct in denying relief. Respondent's construction of the statute thus would neutralize the central reform of federal habeas corpus that Congress enacted in AEDPA.

B. Respondent retorts that interpreting § 2254(d) as limiting reasonableness review to the facts presented to the state court "would render § 2254(e)(2) superfluous." Resp. Brf. at 54-63. But respondent errs in assuming that, because he might

avoid preclusion of his claim under § 2254(d)(1), he therefore becomes entitled to relief. Even where the state-court determination of the claim in light of the factual allegations presented to the state court amounts to an unreasonable application of law under § 2254(d)(1), the petitioner must still prove that the factual allegations are true. It is not uncommon that even superficially compelling factual allegations presented to the state court fail in the crucible of an evidentiary hearing. Section 2254(e)(2), limiting the prisoner's opportunity to prove facts he failed to develop in state court, retains continued applicability where the state-court adjudication was unreasonable, or where the state court has not adjudicated the merits of the claim at all. Certainly there will be situations where resolution of the § 2254(d)(1) inquiry will render resolution of the § 2254(e)(2) question "unnecessary," as this Court held in *Michael Williams* v. *Taylor*, 529 U.S. 420, 444 (2000). But that reality does not read § 2254(e)(2) out of the statute. Rather, it is the natural result of the statutory scheme as envisioned by Congress and already endorsed by this Court in *Michael Williams*.

C. Respondent, further, endorses the Ninth Circuit's view that the only limitation on holding an evidentiary hearing under § 2254(e)(2) is that found in traditional exhaustion principles. In short, in respondent's and the Ninth Circuit's view, § 2254(d)(1) did nothing to limit the federal habeas court's power to review de novo and grant relief on any claim simply by permitting the petitioner to

present facts never presented to the state court, so long as those new facts do not offend traditional exhaustion principles. This view is wrong. Given the crux of the claim on which the Ninth Circuit granted relief—that trial counsel failed to present evidence of organic brain damage at the time of trial—respondent's failure to first present the factual basis supporting his claim to the state court should have precluded a federal evidentiary hearing under § 2254(e)(2). For respondent "failed to present" to the California Supreme Court the central facts underlying the Ninth Circuit's decision to grant relief: that respondent suffers from organic brain damage that drove him into a homicidal rage at the time of the murders.

D. The American Civil Liberties Union posits a hypothetical in which a state court overrules a defendant's objection to evidence of his confession by crediting police officer testimony that he had waived his *Miranda* rights; and then, after expiration of a state statute of limitations on post-judgment attacks, the police belatedly disclose a recording showing that the defendant had invoked his rights instead. ACLU AC Brf. at 17-18. The ACLU complains that, if the rule advocated by the State were adopted, the prisoner would not be entitled to an evidentiary hearing in federal court to prove an unquestionably valid *Miranda* claim.

Although the ACLU might conceive of its hypothetical as illuminating a "perfect storm" of intolerable unfairness under the State's interpretation of § 2254(d)(1), it does nothing of the sort. In the hypothetical scenario, the prisoner would retain a seemingly viable due-process discovery claim under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Kyles* v *Whitley*, 514 U.S. 419 (1995), as well as an apparent false-testimony claim under *Napue* v. *Illinois*, 360 U.S. 264 (1959), and *Giglio* v. *United States*, 405 U.S. 150, 153-54 (1972). If a state court simply closed its doors to the diligent presentation of such claims, as the ACLU improbably speculates, then there would be no state-court determination on the merits of the claims entitled to deferential review in federal court. So § 2254(d)(1) would be no impediment to granting the prisoner relief.

Of course, the ACLU's hypothetical prisoner would have to overcome the separate federal-court procedural bar that likely would descend on any claim a prisoner forfeits under state procedural law. See *Coleman* v *Thompson*, 501 U.S. 722, 729-732 (1991). Just as the federal court itself would not reopen its own previous adjudication of a state prisoner's constitutional claim whenever the prisoner seeks to present new evidence, see 28 U.S.C. § 2244(b)(2), state courts are hardly required to do so either. But that has nothing to do with § 2254(d)(1).

On the other hand, the ACLU hypothetical highlights fundamental deficiencies in the Ninth Circuit's decision in this case. Here, the evidence and facts on which the Ninth Circuit predicated relief were uniquely available to respondent at all times in state and federal court. They consisted of his own family background, his own personality, and his own purported mental condition. If the mental state diagnoses on which the Ninth Circuit relied were available to trial counsel at the time of trial in 1984, then they were necessarily available to state habeas counsel in 1995. But state habeas counsel never presented those diagnoses to the state court. Thus, the very theory of respondent's claim, predicated upon the assertion that the evidence was available and should have been presented at the time of trial, fatally undermines any claim that it was impossible for respondent to present the facts to the state during the subsequent state habeas corpus proceedings. This is why respondent has never explained why he did not present the opinions expressed in the reports of Drs. Vinogradov and Olson in either of the petitions he filed in state court. The lack of an explanation is fatal to any conclusion that respondent exercised the diligence required by § 2254(e)(2) before a federal evidentiary hearing is authorized.

The ACLU hypothetical also brings into relief the fact that no statute of limitations operates in California habeas corpus proceedings. See *In re Clark*, 855 P.2d 729, 738 (Cal. 1993). As Chief Judge Kozinski noted in his dissent, nothing prevented respondent from presenting his new facts to the state court before

asking the federal courts to consider them. PA 82-83; see *In re Robbins*, 959 P.2d 311, 328-30 (Cal. 1998). Unlike the hapless defendant in the ACLU hypothetical, respondent had available to him and actually presented the Vinogradov/Olson diagnoses in federal court, but declined to return to state court to present them there.

Finally, the ACLU hypothesizes late-discovered evidence completely consistent with the facts alleged by the prisoner to the state court. But, here, the evidence respondent presented to the federal court proved that the factual allegations he had made to the state court were false, and the facts found by the federal court were contrary to the facts that had been alleged to the state court. Building on the ACLU's hypothesis, it would be as if the late-discovered recording unquestionably proved that the prisoner never invoked his rights—just as the hypothetical police officers had testified. Under those circumstances the state-court decision to reject the claim presented to it would not only have been reasonable, it unquestionably would have been correct. Here, the evidence presented at the federal evidentiary hearing in the instant case, and the facts found true by the federal court, demonstrated that the factual allegations respondent presented to the California Supreme Court were false.[2] The California Supreme Court's decision

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[2] In addition, the ACLU hypothetical posits a crucial factual determination by the state court that implicates questions about the operation of separate fact-finding provisions in § 2254(d)(2) and (e)(1)—not at issue in the claim of § 2254(d)(1) legal error

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was not only reasonable, see pp. 14-24, post, it was correct.

III. THE CALIFORNIA SUPREME COURT REASONABLY REJECTED RESPONDENT'S CLAIM OF INEFFECTIVE COUNSEL

As outlined in the State's brief on the merits, the facts presented to the California Supreme Court compel the conclusion that the state-court decision rejecting respondent's ineffective-counsel claim was correct—or at least objectively reasonable when viewed through the "double deference" required by AEDPA and *Strickland*. See *Knowles* v. *Mirzayance*, 129 S. Ct. 1411, 1420 (2009); *Yarborough* v. *Gentry*, 540 U.S. 1, 6 (2004) (per curiam). Respondent, however, betrays a fundamental misunderstanding of AEDPA and *Strickland*. For, much like the Ninth Circuit did in the opinion below, respondent engages in an analysis of the substantive claim of ineffective assistance of counsel without showing deference to trial counsel's decisions, and without ever addressing whether the state court could have reasonably come to another conclusion. Resp. Brf. at 39.

A. Respondent ignores a number of facts that undermine his claim. For example, respondent—as the Ninth Circuit did—places great weight on defense counsel Wilbur Dettmar's assertion, made when the

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here—that his Court has yet to resolve. See *Wood* v. *Allen*, 130 S. Ct. 841, 851 (2010).

trial court was considering whether to permit the prosecution to present aggravating evidence, that he had done nothing to investigate available mitigating evidence because he had not received proper notice of the prosecution's aggravating evidence. See RT 7249-50. Respondent and the Ninth Circuit also rely upon the statement in one of defense counsel Harry Bramard's declarations that "Mr. Dettmar and I did not prepare a case in mitigation." JA 214. However, the trial records and documentary evidence provided by respondent proved that these assertions were false.

Dettmar's statement to the trial court was made on April 24, 1984. RT 7223, 7249-50. But, Dr. Stalberg's letter to Dettmar was dated March 14, 1984, and referred to an interview of respondent he had conducted on March 11, 1984, pursuant to an even earlier confidential order of the trial court. JA 129-32. In that letter, Dr. Stalberg specifically referred to the directions he had been given: "The issues are past mental state *as well as mitigation*, if the special circumstances are found to be true." JA 129 (emphasis added). Further, in a paragraph that begins "[a]s for mitigation," Dr. Stalberg referred to "extreme mental or emotional disturbance," and to whether respondent had "impaired ability to appreciate the criminality or conform his conduct to the requirements of the law." JA 131. These statements precisely echo language found in California Penal Code section 190.3, the statute defining the factors considered by the penalty-phase jury in determining whether to sentence the defendant to death or to life in prison without parole. JA 131. The letter therefore proves that trial counsel had begun investigating

penalty phase defenses by March 11, 1984, six weeks before the penalty phase commenced.

In support of his state habeas petitions, respondent presented the California Supreme Court with Dr Stalberg's letter to defense counsel Exhibits in Support of Petition for Writ of Habeas Corpus, California Supreme Court case no S034501, district court docket no 49, lodgment C.2, exhibit 5. Thus, respondent's allegation that trial counsel had not investigated mitigating evidence prior to the penalty trial was expressly and directly contradicted by the undisputed documentary evidence submitted by respondent himself This evidence provided a reasonable basis for the California Supreme Court's decision rejecting the ineffective-counsel claim.

Respondent would have this Court believe, however, that the California Supreme Court willfully blinds itself to anything not contained in the four corners of the petition, and that it automatically accepts as axiomatic any factual allegation in the petition, regardless of how far-fetched or how inconsistent with the evidence attached to the petition or with the underlying record. Respondent misunderstands California law A habeas corpus petitioner in California bears the initial burden of establishing "a prima facie case" for the requested relief. *In re Lawler*, 588 P.2d 1257, 1259 (Cal 1979) Unless "it initially appears from the allegations of a habeas corpus petition filed in an appellate court, and from '*any matter of record pertaining to the case*,'" that the required "prima facie" showing has been made, the court will not issue the order "to show cause why the relief sought should not be granted" *In re Hochberg*,

471 P.2d 1, 873 n.2 (Cal. 1970) (emphasis added). Thus, under California law, the entire record of the case is considered when passing on the question of whether the petition alleges a prima facie case of constitutional defect. *In re Clark*, 855 P.2d at 741-42 (state habeas court assumes the often burdensome task of reviewing the state-court record to see if the claims in the petition have merit and to ascertain if the purported error was prejudicial).[3]

While respondent *alleged* that trial counsel had failed to investigate the availability of mitigating mental health evidence, the California Supreme Court was aware that trial counsel had done exactly that investigation, because the records provided by respondent himself—in the form of Dr. Stalberg's report to trial counsel—established that indisputable fact. The California Supreme Court was also aware—because the documents supplied by respondent also established it—that Dr. Stalberg had offered respondent a number of unhelpful opinions that were in no way tentative, and that in no way expressed any reservation about his confidence in opining on respondent's mental state and on the unavailability of mental defenses at either the guilt or penalty phases

[3] No other rule makes sense. Following respondent's logic, a California state petitioner alleging, for example, that he was completely denied counsel at trial would always be entitled to an order to show cause and an evidentiary hearing for the alleged Sixth Amendment violation, even if the trial record indisputably showed that he was represented by counsel at every stage of the proceedings.

of the trial. Under these circumstances, the state court reasonably concluded that respondent had failed to make out a prima facie claim that trial counsel acted in a prejudicially deficient manner. *See Wiggins* v. *Smith*, 539 U.S. 510, 528 (2003) (state court unreasonably accepted as true allegations contradicted by the documentary record).

3 On the question of family background evidence, the California Supreme Court was also aware that trial counsel had actually presented mitigating background and family evidence, in the form of testimony from respondent's mother, Bernice Brashear. That respondent was willing on habeas corpus to question the decision regarding what evidence to present was hardly surprising, given the result of his trial. However, respondent never alleged that he had alerted trial counsel that his mother's testimony was in any way inaccurate,[4] or that there were other family members available who would offer an alternative view on his childhood. Nor did respondent proffer a declaration from Brashear, either recanting her testimony or indicating that she had told trial counsel something that would have alerted them that others in the family might have a different view of things.

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[4] There is a reason for this: respondent's recollections of his young life more closely resembled his mother's penalty phase testimony than the alternate background/family evidence presented at the federal evidentiary hearing. *See* JA 133-48.

Further, the California Supreme Court was aware that the mental health investigation trial counsel undertook revealed that respondent suffered from no mitigating mental disease or defect. Quite the opposite: the picture of respondent's mental health that emerged was aggravating. *Darden* v. *Wainwright*, 477 U.S. 168, 186-87 (1986) (sociopathy evidence is aggravating). Failure to put on this evidence was not incompetent and did not in any way prejudice respondent.

Finally, given the "piddling" mitigating value of the alternative family history evidence respondent presented to the state court, PA 84, respondent likewise failed to meet his burden of demonstrating that the California Supreme Court should have felt compelled to conclude that respondent was prejudiced by trial counsel's alleged deficiencies. The state court decision, therefore, was reasonable.

C. Respondent complains that the State did not address (to his satisfaction) three of this Court's cases analyzing claims of ineffective assistance of counsel: *Rompilla* v. *Beard*, 545 U.S. 374 (2005), *Wiggins* v. *Smith*, 539 U.S. 510, and *Terry Williams* v. *Taylor*, 529 U.S. 362 (2000). The State, however, addressed all three cases in the reply brief in support of the petition for writ of certiorari. Cert. Reply at 7. As the State noted in that brief, this Court's holdings in those cases did not in any way alter the analytical framework for assessing claims of ineffective assistance of counsel. *Id.* The State did not re-address

them in the opening brief on the merits because they are inapposite.

Terry Williams, *Wiggins* and *Rompilla* are simply as-applied examples of prejudicially deficient performance that did not alter the basic rules articulated in *Strickland*. *Rompilla* v. *Beard*, 545 U.S. at 380-81; *Wiggins* v. *Smith*, 539 U.S. at 521; *Terry Williams* v. *Taylor*, 529 U.S. at 367. None of those cases compel the conclusion that the California Supreme Court's decision denying respondent relief was unreasonable.

In *Rompilla*, 545 U.S. at 388, this Court held that trial counsel was ineffective for failing to conduct any investigation of the evidence that the prosecution said that it was going to introduce in aggravation. Here, by contrast, trial counsel investigated the availability of mitigating mental health evidence by having respondent examined by a qualified psychiatrist.

In *Wiggins*, 539 U.S. at 527, 534, this Court criticized counsel for failing to further investigate when the initial investigation revealed that the defendant had a "disgusting" background of "misery." Here, by contrast, the initial investigations revealed nothing untoward about respondent's background, which was perfectly consistent with the report that was received from the retained expert psychiatrist. This Court has made it clear that it is reasonable for a trial attorney to make decisions regarding what

avenues to further investigate based upon the results of an initial investigation. *Burger* v. *Kemp*, 483 U.S. 776, 795 (1987); *Strickland* v. *Washington*, 466 U.S. at 690-91.

Finally, in *Terry Williams*, 529 U.S. 362, the state supreme court erroneously held that *Lockhart* v. *Fretwell*, 506 U.S. 394 (1993), had altered the *Strickland* analysis. This Court held, therefore, that no § 2254(d)(1) deference was due to the state court's determination of the matter. As to the substantive *Strickland* analysis, Terry Williams's lawyers did not investigate records that they knew existed because they erroneously and incompetently believed that they could not gain access to them. 529 U.S. at 395-99. Here, by contrast, counsel investigated respondent's background and found the evidence they uncovered during that investigation to be consistent with what their expert told them about respondent's mental health. There was no unexplored tantalizing lead such as was present in *Terry Williams*.

Instead, every lead that respondent's trial attorneys explored came back to the same basic set of facts: respondent had a childhood unmarked by substantial abuse or neglect. In light of this Court's teaching in *Burger* v. *Kemp*, 483 U.S. at 795, and *Strickland* v. *Washington*, 466 U.S. at 690-91, that an attorney need not continue investigating a particular avenue if it can be reasonably concluded that it will not be fruitful, the California Supreme Court's

decision rejecting the claim was not only reasonable, but also correct.

D. Respondent argues that the State was wide of the mark in asserting that the Ninth Circuit opinion articulated a rule requiring that a specific form of mitigating evidence always be presented—specifically, evidence that the defendant had a bad childhood. Resp Brf at 42-43. However, the amicus curiae brief of the Disability Rights Legal Foundation argues not only that evidence that the defendant had a bad childhood must always be presented, but further that trial counsel is constitutionally deficient in any capital case in which the jury is not presented with evidence that the defendant has brain damage. DRLF AC Brf at 5-12. The DRLF provides no basis for its implicit assertion that the California Supreme Court should be charged with the knowledge of the alleged correlation between brain damage and capital crimes presented in this case for the first time in the DRLF brief. Nor does the DRLF brief explain how "clearly established" law compelled the California Supreme Court to apply this startling new interpretation of *Strickland* to the instant case.

The DRLF argues that the Constitution required trial counsel to reject their retained expert's opinion that respondent did not suffer from brain damage and had no mitigating mental disease or defect, and seek out additional expert opinions until trial counsel found an expert willing to opine that respondent

had brain damage. DRLF AC Brf. at 16.[5] However, even the Ninth Circuit has rejected the suggestion that the Constitution compels trial counsel to find a particular opinion, regardless of how many experts must be retained and discarded in order to find it. See *Hendricks* v. *Calderon*, 70 F 3d 1032, 1038-39 (9th Cir. 1995) (rejecting an argument that an attorney must engage in expert-witness shopping). To the contrary, a trial attorney may reasonably abandon investigation into a potential line of defense if it is determined that it is not helpful or may be harmful *Wood* v. *Allen*, 130 S. Ct. at 849-51; *Strickland* v. *Washington*, 466 U S. at 690-91

Although the DRLF brief argues that respondent was prejudiced by the purported errors of counsel, respondent presented to the California Supreme Court no declaration from Dr. Stalberg describing any ways his opinions about respondent's mental health would have been different had he been given the additional evidence gathered by habeas corpus counsel.[6] Because respondent never alleged facts

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[5] The DRLF's assertions about an alleged correlation between brain damage and capital crimes were never presented to the California Supreme Court (or to the district court, or to the Ninth Circuit), and the studies cited by the DRLF in support of the alleged correlation significantly post-date respondent's trial DRLF AC Brf at 7-11 nn 2-15 There is thus no basis for concluding that trial counsel had any reason to know about the DRLF's alleged correlation between brain damage and capital crimes

[6] The reason for this omission became clear during the federal evidentiary hearing none of the information gathered by

(Continued on following page)

establishing a reasonable probability of a more favorable determination had trial counsel done the things respondent told the California Supreme Court that trial counsel should have done, *Strickland* v *Washington*, 466 U.S at 694, it is impossible to conclude that the state-court decision rejecting the claim was unreasonable.

* * *

The Ninth Circuit's decision to grant relief based on new evidence in support of facts never alleged to the state court is contrary to the plain language of § 2254(d)(1) and is at war with the central AEDPA habeas corpus reforms Proper application of the § 2254(d)(1) rule of deference compels the conclusion that the California Supreme Court's decision rejecting respondent's ineffective-counsel claim was reasonable under clearly established law in light of the facts alleged to that court Federal habeas corpus relief therefore is unavailable

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habeas counsel in the years following respondent's trial called into doubt Dr Stalberg's original diagnosis that respondent is simply a psychopath See Dkt no 202 at 6, 9th Cir ER vol 4 at 976

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

VINCENT CULLEN, JR., Acting Warden,
California State Prison at San Quentin,
Petitioner,

—v.—

SCOTT LYNN PINHOLSTER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether a federal court may reject a state-court adjudication of a petitioner's claim as "unreasonable" under 28 U.S.C. § 2254, and thus grant habeas corpus relief, based on a factual predicate for the claim that the petitioner could have presented to the state court but did not.

2. Whether a federal court may grant relief under 28 U.S.C. § 2254 on a claim that trial counsel in a capital case ineffectively failed to produce mitigating evidence of organic brain damage and a difficult childhood because counsel, who consulted with a psychiatrist who disclaimed any such diagnosis, as well as with petitioner and his mother, did not seek out a different psychiatrist and different family members.

This *amicus curiae* brief addresses only Question 1.

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. We respectfully submit this brief to assist the Court in resolving serious questions regarding a federal court's authority to address a habeas corpus petition filed by a state prisoner claiming that he is in custody in violation of federal law. Given its longstanding interest in the vindication of federal rights, the questions before the Court are of substantial importance to the ACLU and its members.

STATEMENT OF THE CASE

The respondent, Scott Lynn Pinholster, was convicted in a California state court and was condemned to death. He sought postconviction relief in state court, contending, *inter alia*, that he had been denied effective assistance of counsel at the penalty phase of the trial, because counsel had not properly investigated his background and mental condition and had not presented important mitigating evidence to the jury. The California Supreme Court denied relief on the "substantive

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[1] Pursuant to Rule 37.3, letters of consent to the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

ground" that the Sixth Amendment claim was "without merit," but gave no explanation for that conclusion.

Pinholster then petitioned the United States District Court for the Central District of California for a federal writ of habeas corpus. The district court held a hearing, heard testimony from two new witnesses regarding Pinholster's mental condition, concluded that Pinholster's Sixth Amendment claim was meritorious, and awarded federal relief.

A panel of the Ninth Circuit reversed on the ground that the state court could reasonably have concluded that Pinholster's right to effective assistance of counsel had not been violated and that federal relief was therefore barred by 28 U.S.C. § 2254(d)(1), a provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Pinholster v. Ayers*, 525 F.3d 742 (9th Cir. 2008). The full court, sitting *en banc*, reinstated the district court's judgment. *Pinholster v. Ayers*, 590 F.3d 651 (9th Cir. 2009) (*en banc*).

The *en banc* court cited alternative bases for its decision. On the one hand, the court explained that Pinholster's petitions in state and federal court contained "many substantially identical facts" and that while the two new witnesses in federal court had offered "different mental impairment theories," they had "relied on the same background facts" already in the state court record. Given that understanding, the evidentiary record developed in the federal habeas proceedings provided additional support for, but was not essential to, the Ninth Circuit's holding that the state court's rejection of

Pinholster's Sixth Amendment claim was unreasonable within the meaning of § 2254(d)(1) and that federal relief was warranted. *Id.* at 669.

On the other hand, the *en banc* court held that the district court's conduct of an evidentiary hearing was appropriate under another provision of AEDPA, 28 U.S.C. § 2254(e)(2);[2] that the additional theories about Pinholster's mental health introduced in federal court could inform a decision on whether the state court's decision on the Sixth Amendment claim was unreasonable for purposes of § 2254(d)(1); that, in light of all the evidence advanced in state and federal court, the state court's decision *was* unreasonable; and, accordingly, § 2254(d)(1) did not bar federal habeas relief. *Id.* at 684.

This Court granted the warden's petition for certiorari to examine the two questions presented.

SUMMARY OF ARGUMENT

This *amicus* brief notes, but lays aside, a threshold issue in this case—whether the California Supreme Court's summary disposition of the respondent's Sixth Amendment claim triggered 28 U.S.C. § 2254(d). The questions the warden has framed for review proceed from an erroneous

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[2] The district court had decided to hold a hearing on the erroneous assumption that § 2254(e)(2) was inapplicable. Later, the district court issued an addendum explaining that § 2254(e)(2) did not prohibit a federal hearing in the circumstances of this case. The *en banc* circuit court sustained the addendum *Pinholster*, 590 F.3d at 668.

premise—namely, that the California Supreme Court "adjudicated" Mr. Pinholster's claim "on the merits," thus triggering the restrictions on federal habeas relief in § 2254(d). *Amicus* briefs filed in *Harrington v. Richter*, No. 09-587, demonstrate that a summary disposition like the order in this case is not "on the merits" and does not bring § 2254(d) into play. Brief for California Attorneys for Criminal Justice and the California Academy of Appellate Lawyers; Brief for the National Association of Criminal Defense Lawyers. We need not rehearse that argument here. We respectfully submit, however, that because the premise underlying the questions presented in this case is unsound, the Court should dismiss the writ as improvidently granted.

We also set to one side the questions that divided the parties and the circuit judges below—whether the circuit court's *en banc* judgment rests on evidence that emerged in federal court and, if so, whether that evidence was considered consistent with 28 U.S.C. § 2254(e)(2). Because those issues are fully addressed by respondent, this brief focuses instead on several additional arguments presented by the warden and his *amicus*, the Criminal Justice Legal Foundation (CFLF). These arguments are not only wrong; they distract attention from the actual issues raised by this case. We nonetheless address them here since similar arguments have also surfaced in other recent and pending cases in this Court. *See e.g., Harrington v. Richter, supra.*

First, the warden contends that a federal court entertaining a habeas corpus petition must always begin by determining whether a state court decision

rejecting a federal claim was unreasonable in view of the evidence in state court alone. Second, he insists that this is so because a state decision that was not unreasonable in light of the state record always forecloses federal relief—despite a proffer of additional proof that, if accepted, would demonstrate either that the state court's decision was not on the merits or that the state decision against the prisoner was unreasonable. Neither of these propositions is sound.

The habeas corpus statutes do not require a federal court to determine the reasonableness of a previous state court decision exclusively in view of the state record—*before* deciding whether federal fact-finding is warranted. Quite the opposite. If it appears that factual allegations outside the state record may be dispositive, the first order of business is to consider whether those allegations are premature under 28 U.S.C. § 2254(b), which codifies the exhaustion doctrine, or barred by 28 U.S.C. § 2254(e)(2), which prohibits federal consideration of factual matters because of the prisoner's default in state court. If federal fact-finding is neither premature nor barred, the federal court may take more evidence and find additional facts.

In some cases, new facts properly developed in federal court materially change the factual basis of a claim so that the previous state court decision in ignorance of those facts should not be deemed a decision "on the merits" and thus should not trigger § 2254(d). In other cases, new facts leave habeas petitions subject to § 2254(d), but nonetheless demonstrate that a state decision against the

prisoner was unreasonable on the full record and, accordingly, that habeas relief can be awarded.

The positions taken by the warden are inconsistent with this Court's decisions regarding federal fact-finding, particularly *Schriro v. Landrigan*, 550 U.S. 465 (2007), and, if accepted, would frustrate the overarching framework Congress has established for processing habeas litigation, particularly the functions served by § 2254(e)(2).

The CJLF's argument that § 2254(d) is a rule of preclusion defies both this Court's precedents and the congressional plan. This single provision was never meant to deal with all the questions that habeas litigation presents. Congress enacted § 2254(b) and § 2254(e)(2) to ensure that federal courts do not address factual allegations that might yet be taken to state court or were not presented in state court because of the prisoner's default. The CJLF's revisionist account of § 2254(d) would largely displace those provisions from their fields of operations.

ARGUMENT

I. WHEN THE PLEADINGS IN A HABEAS CASE REVEAL DISPUTED ISSUES OF FACT, THE FIRST ORDER OF BUSINESS FOR THE FEDERAL COURT IS TO DETERMINE WHETHER FEDERAL FACT-FINDING PROCEEDINGS ARE WARRANTED

The warden reads § 2254(d)(1) to mean that, in every case, a federal court entertaining a habeas

corpus petition must first determine whether a previous state court decision on a prisoner's claim was unreasonable when judged exclusively in view of the facts (or factual allegations taken to be true) already in the state court record. Pet.Br. at 38.

As a threshold matter, this argument assumes that the evidence introduced at the federal fact-finding hearing was central to the *en banc* court's grant of habeas relief. But, as explained above, the court below offered alternative grounds for its decision, one of which did not depend on the federal evidence to support its holding. *See* pp. 2-3, *supra*.[3]

In any event, neither § 2254(d)(1), nor any other habeas statute, establishes any such order of march for a federal court to follow. This Court explained in *Schriro v. Landrigan*, 550 U.S. 465 (2007), that AEDPA did not change the standards previously adopted to guide a habeas court in deciding whether to grant a federal hearing. *Id.* at 473, citing *Brown v. Allen*, 344 U.S. 443 (1953), and *Townsend v. Sain*, 372 U.S. 293 (1963).

As in any kind of litigation, the court begins with the basic papers—the petition, any answer filed by the warden, and any reply by the prisoner. Those documents typically reveal whether there are disputed issues of fact that must be resolved to decide the ultimate legal questions. In most cases, the quarrel between the parties is over the proper disposition of a claim in light of the state court record as it stands. Neither party offers to augment that

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[3] This point is more fully developed in respondent's brief.

record, and a federal court's attention is therefore necessarily confined to it.

When, however, the initial pleadings indicate that the parties dispute factual matters outside the existing record in state court, the federal court must decide whether a federal hearing is warranted. 28 U.S.C. § 2254, Rule 8(a) of the Rules Governing Section 2254 Cases.

The court's discretion is restricted in important respects. Under 28 U.S.C. § 2254(b), new factual allegations may be premature if, at the time the petition is filed, state avenues for treating them are open and must be exhausted. *Vasquez v. Hillery*, 474 U.S. 254 (1986). And, under § 2254(e)(2), federal fact-finding may be barred because of the prisoner's default. If the prisoner failed through lack of diligence to develop the facts in state court, a federal court can hold a hearing only if one of the conditions in § 2254(e)(2) is satisfied.

The limitations on habeas relief established by 28 U.S.C. § 2254(d) also must be taken into account. If it is clear that the prisoner cannot be entitled to relief even if his or her allegations are proven, the court is "not required" to hold a federal hearing. *Landrigan*, *supra* at 474. If, however, the allegations, if sustained, might justify habeas relief, and if federal fact-finding is neither premature nor barred, the federal court is obliged to conduct its own investigation.

If the federal court concludes that a federal hearing is warranted, not premature under § 2254(b), and not barred by § 2254(e)(2), the court

must take additional evidence that supplements the record built previously in state court. Then, with the complete factual predicate in hand, the court will turn to the federal legal claim itself.

The additional facts developed in federal court may materially change the factual basis of the prisoner's claim. When this is true, the previous state court decision, reached without consideration of the additional facts, was not "on the merits" within the meaning of § 2254(d). Accordingly, there is "no relevant state-court determination to which one could defer," and the federal court must address the merits *de novo*. *Holland v. Jackson*, 542 U.S. 649, 653 (2004) (*per curiam*) (acknowledging lower court authority on this point and assuming *arguendo* that this analysis is correct). By hypothesis, crucial facts were not developed in state court despite the prisoner's diligence. Any state hearing therefore did not, and could not, properly evaluate the factual underpinnings of the claim to determine its merits.

If the additional facts developed in federal court do not materially alter the factual basis of the claim, and the case remains subject to § 2254(d)(1), the federal court may consider the additional facts in determining whether habeas relief is available. The whole point of *Landrigan's* admonition that the court must decide whether to hold a hearing with an eye on § 2254(d)(1) is that some proffers of evidence will not justify federal fact-finding in view of § 2254(d)(1), but that other proffers of proof *will*.

This logical sequence for addressing fact-sensitive cases would be frustrated if a federal court were required to ignore factual disputes outside the

state record and to determine the availability of federal relief exclusively on the basis of the more limited evidence in state court—before deciding whether federal fact-finding is warranted and neither premature under § 2254(b), nor barred by § 2254(e)(2). Until appropriate federal fact-finding is conducted, the federal court cannot know even whether § 2254(d) is applicable, far less dispositive.

Accordingly, the federal court must first determine whether federal fact-finding is called for. If it is, the court must resolve the extra-record factual dispute between the parties and determine the truth. Then, the federal court will turn to the effect, if any, that § 2254(d)(1) may have on the availability of relief. It would be "bizarre if a federal court had to defer to state-court factual findings made without an evidentiary record to decide whether the factual findings were erroneous." *Wellons v. Hall*, ___ U.S. __, 130 S.Ct. 727, 730-31 n.3 (2010). Congress has not established "such a crabbed and illogical approach to habeas procedures." *Id.*

II. REQUIRING A FEDERAL COURT TO DENY RELIEF UNDER § 2254(d)(1) IN LIGHT OF THE STATE RECORD ALONE WOULD ELIMINATE FEDERAL FACT-FINDING WHERE THIS COURT'S PRECEDENTS AND THE CONGRESSIONAL PLAN CONTEMPLATE THAT FEDERAL FACTUAL INVESTIGATION IS WARRANTED

The construction the warden would impose on § 2254(d)(1) does not merely postpone federal fact-finding, but extinguishes federal consideration of additional facts entirely. The warden insists that § 2254(d)(1) requires a federal habeas court always to determine whether a previous state decision was unreasonable in light of the facts presented in state court. By his account, if the federal court concludes that the state decision was not unreasonable in view of the factual record in state court, the case is at an end. Pet.Br. at 24. According to the warden, a federal court cannot consider additional facts (or factual allegations) advanced in federal court under these circumstances and, indeed, is unable to receive more proof. Federal relief is foreclosed even if the parties dispute other facts, extrinsic to the state record, and even if a federal hearing on those facts is warranted and not foreclosed by § 2254(e)(2). Of course, if the federal court concludes that the state court decision *was* unreasonable in view of the facts in the state record, there will typically be no reason for further federal fact-finding. An unreasonable state court was incorrect *a fortiori*.

The warden's interpretation conflicts with this Court's relevant precedents and, if adopted, would frustrate the general statutory scheme established by AEDPA.

A. The Precedents

This Court has often recognized that, in some circumstances, a federal habeas court can hold its own fact-finding proceedings and can rely on facts developed in federal court to resolve the legal issues.

No fair reading of *Landrigan*, *supra*, can conclude that § 2254(d)(1) prohibits federal fact-finding. The Court's very point was that a federal court must consider whether the facts a prisoner wishes to develop in federal court, if established, would warrant relief within the scheme that includes § 2254(d)(1). The premise of that crucial point was obviously that any evidence the federal court might hear, and any facts the federal court might find, would go to the merits of the prisoner's claim and, in cases subject to § 2254(d)(1), to the availability of federal relief—provided that the federal court develops additional evidence and facts consistent with the standards for federal fact-finding, § 2254(b), and, most important, § 2254(e)(2).[4]

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[4] Justice Thomas' opinion for the Court in *Landrigan* cited lower court decisions also taking the view that a federal court's decision regarding a hearing must take account of whether the prisoner's allegations, if sustained in federal court, can win habeas relief under § 2254(d)(1). In the first case cited, *Mayes v. Gibson*, 210 F.3d 1284 (10th Cir. 2000), the prisoner had requested a state hearing on a claim of ineffective assistance, supporting the claim with affidavits from acquaintances stating

Other decisions confirm that federal courts can take and consider additional evidence. To be sure, in *Holland v. Jackson*, *supra*, the Court initially stated that "[i]n this and related contexts we have made it clear that whether a state court's decision was unreasonable must be assessed in light of the record the court had before it." 542 U.S. at 652.[5] But, in

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that they would have given mitigation testimony if only counsel had contacted them. The state court denied a hearing and rejected the claim. The Ninth Circuit concluded that a federal hearing on the affidavits was necessary to determine whether the state court's decision was unreasonable under § 2254(d). *Id.* at 1288-91. In other cases, circuit courts had found federal hearings unnecessary, because prisoners did not allege facts outside the state record that *could* win relief. In *Totten v. Merkle*, 137 F.3d 1172 (9th Cir. 1998), the circuit court affirmed the denial of a federal hearing, but explained that the evidence the prisoner proffered to show counsel's ineffectiveness could not establish the necessary prejudice. *Id.* at 1176. In *Anderson v. Attorney General*, 425 F.3d 853 (10th Cir. 2005), the court affirmed the denial of a hearing where the prisoner offered no particularized allegations demonstrating a dispute of material fact outside the state record. *Id.* at 858-59. In *Clark v. Johnson*, 202 F.3d 760 (5th Cir. 2000), the court declined to find that the district court had abused its discretion by denying discovery and a hearing. Again, the explanation was that the prisoner had alleged "no fact" that, if proved, would entitle him to relief. In the last case cited, *Campbell v. Vaughn*, 209 F.3d 280 (3d Cir. 2000), the prisoner made no proffer of new evidence in federal court, but sought a federal hearing to determine a factual question he insisted the state court had not resolved. The circuit court found that the state court *had* resolved the issue and concluded that, accordingly, a federal hearing was not required.

[5] On this point, the Court cited *Yarborough v. Gentry*, 540 U.S. 1 (2003) (*per curiam*), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), and a footnote in *Bell v. Cone*, 535 U.S. 685 (2002). The prisoner in *Gentry* proffered no additional evidence in federal

the next breath, the Court recognized that evidence not in the state record "could have been the subject of an evidentiary hearing" in federal court, provided such a hearing was not barred by § 2254(e)(2). *Id.* at 652-53.

In *Bradshaw v. Richey*, 546 U.S. 74 (2005) (*per curiam*), the warden objected that the circuit court below had improperly relied on evidence that had not been before the state court, but had surfaced via discovery in federal court. The argument was not that § 2254(d)(1) foreclosed consideration of the evidence, but that the circuit court had examined it without determining that the prisoner had exercised the diligence required by § 2254(e)(2). *Id.* at 79. The prisoner responded that the warden had not preserved his § 2254(e)(2) objection, and this Court remanded for a determination of that question. *Id.* at 80.

The warden contends that this Court has recognized that the § 2254(d)(1) inquiry always

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court, so the reasonableness of the state court's rejection of his claim necessarily had to be determined on the basis of the existing state court record. The prisoner in *Miller-El* also relied exclusively on evidence that had been before the state court. Moreover, *Miller-El* involved § 2254(d)(2), which, for reasons explained below, contains an explicit limitation to the evidence presented in state court. In the footnote in *Cone*, the Court faulted the dissent for relying on medical records that had not been presented in state court. The Court noted that the prisoner himself did not contend that this Court "*could* consider ... records obtained in the federal habeas proceedings." *Cone*, *supra*, at 697 n.4 (emphasis added). Neither the Court nor the dissent in *Cone* addressed the question whether the Court "could" consider the records under § 2254(e)(2).

comes first and depends entirely on the evidence in state court. Pet.Br. at 38. The warden's only pertinent citation is to a single sentence in *Michael Williams v. Taylor*, *supra*, where the Court explained that it was "unnecessary to reach the question whether § 2254(e)(2) would permit a hearing" on a claim that the prosecution had failed to disclose that a key witness had entered an informal plea agreement, where the circuit court below had rejected the claim "on the merits under § 2254(d)(1)." *Id.* at 444.[6]

This sentence is not authority for the proposition that once a federal court has concluded that a state court decision was not unreasonable in view of the facts in state court, it is futile to hold a hearing and supplement the state record with additional evidence. The claim regarding the witness' plea agreement *had* been considered and rejected in state court, and the circuit court below had treated the state court's decision as on the merits within the meaning of § 2254(d)(1). But the circuit court had concluded that the prisoner could not succeed with the claim *even if* a federal hearing was held and he established that his allegations about the plea agreement were true. As a matter of law, the plea agreement was not material. *Williams v. Taylor*, 189 F.3d 421, 429 (4th Cir. 1999). *That* was the reason it was unnecessary to decide whether a hearing could be held—because the prisoner's

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[6] The *Michael Williams* case was primarily about whether § 2254(e)(2) permitted the prisoner to develop the facts underlying two other claims that had not been adjudicated in state court.

allegations, if true, did not make out a meritorious claim.

B. The General Plan Embodied in AEDPA

The warden points out that § 2254(d)(1)'s companion provision, § 2254(d)(2), explicitly states that a federal court is to determine whether a previous state court decision on a claim was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Pet.Br. at 25. It follows, he insists, that a federal court is equally confined to an examination of the evidence in state court under § 2254(d)(1).

This argument has things precisely backward. Under the relevant canon, the explicit reference in § 2254(d)(2) to the evidence in state court, coupled with the absence of any such reference in § 2254(d)(1), invites the inference that a federal court must restrict itself to the state record in the one context, but not in the other. *Expressio unius est exclusio alterius.*

The warden protests that there is "no reason to think that Congress meant the concept of reasonableness in § 2254(d)(2) to be fundamentally different from reasonableness in § 2254(d)(1)." Pet.Br. at 25. But there *is* a reason to limit the analysis in § 2254(d)(2) to the evidence in state court, but to allow for the consideration of additional evidence in the § 2254(d)(1) analysis.

It makes perfect sense, in the context of § 2254(d)(2), that the reasonableness of a state court's factual determinations should be appraised

exclusively on the basis of the state record. The point of the exercise is to identify factual findings that were reasonable given the evidence the state court had at the time and, on that basis, to instruct a federal habeas court to respect those findings. The form this respect takes is a presumption of correctness, established by 28 U.S.C. § 2254(e)(1), rebuttable only by compelling evidence in federal court showing that the state court findings were erroneous, after all.[7]

A hypothetical may help to show how the warden's interpretation of § 2254(d)(1) would frustrate the routine application of the analysis contemplated by § 2254(d)(2) and § 2254(e)(1). Suppose that defense counsel intends to object to the admission of a statement elicited from the defendant on the ground that it was obtained in violation of *Miranda*. The defendant insists that he explicitly stated in the interrogation room that he did not want to talk to the police, but, instead, wished to invoke his privilege to remain silent. The officers state, by contrast, that the defendant was willing to cooperate and that he waived the privilege. Defense counsel requests access to any recording of the interrogation session, but is told that none exists. Counsel then rests his objection exclusively on the defendant's testimony. The trial judge believes the officers and admits the statement; the defendant is convicted; the state appellate courts affirm, expressly approving the

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[7] The ACLU explained the interplay between § 2254(e)(1) and § 2254(d)(2) more fully in an *amicus* brief in *Wood v. Allen*, ___ U.S. ___, 130 S.Ct. 841 (2010), where the Court found it unnecessary to engage the issue. *Id.* at 849.

trial court's treatment of the *Miranda* claim. Later, a property clerk provides defense counsel with a recording of the interrogation session that unambiguously substantiates the defendant's account.

Counsel files an application for postconviction relief in state court, but both the trial-level and appellate courts hold that the application is too late under the state statute of limitations. Counsel then petitions for federal habeas relief, offering to prove what actually happened in the interrogation room on the basis of the recording.

1. The Analysis Under § 2254(d)(2) and § 2254(e)(1).

As in any other case, the federal court in this hypothetical must begin with the basic pleadings and assess whether there are disputed questions of fact that must be resolved in order to determine the legal issues. Of course, this prisoner does proffer proof outside the extant state record. The federal court must then determine whether examining the recording is warranted under the standards in *Brown* and *Townsend* and neither premature under § 2254(b) nor barred by § 2254(e)(2). And, here again, following *Landrigan*, the court must make this determination with an eye on the limits on habeas relief established by § 2254(d).

In this instance, the prisoner proposes not to only to supplement the factual record on which the state court relied, but to disprove key facts the state court reached in light of an incomplete record. Accordingly, in deciding whether to consider the

recording the federal court must take account of § 2254(d)(2), which bars relief unless the state court's decision was based on an unreasonable determination of the facts in light of the state court record, and, in turn, § 2254(e)(1), which creates the presumption in favor of state factual findings that were not unreasonable, given the evidence the state court had at the time.[8]

In this scenario, the federal court will conclude that federal fact-finding is warranted. The exhaustion requirement in § 2254(b) is satisfied, because the state court has barred the prisoner's postconviction petition as untimely, and there is no currently available avenue for presenting the recording to the state courts. The diligence requirement in § 2254(e)(2) is satisfied, because defense counsel asked for the recording but was told none existed. And, under § 2254(e)(1), the court needs to examine the recording to determine whether it provides clear and convincing evidence showing that the state court's factual findings were erroneous. The court is not required to hold a

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[8] Not every offer of additional evidence in federal court challenges the accuracy of the facts found in state court. This hypothetical does involve such a challenge in order to illustrate the connection between § 2254(d)(2) and § 2254(e)(1). The hypothetical shows that only facts that were *reasonably* determined in state court warrant acceptance, unless the prisoner produces clear and convincing rebuttal evidence. See Brief for the ACLU in *Wood v. Allen*, *supra*. Since Mr. Pinholster does not challenge factual determinations made by the California Supreme Court, the presumption in § 2254(e)(1) is not implicated here.

hearing on *any* offer of proof outside the state record, but in this instance it appears that the recording, if it shows what the prisoner says it shows, will prove that the state court's factual findings were wrong, albeit reasonable in light of the conflicting testimony the state court was given.

If the federal court concludes, on the basis of the clear and convincing evidence supplied by the recording, that the prisoner's account of the interrogation was true all along, the court will equally conclude that the *Miranda* claim is meritorious. Obviously, § 2254(d)(2) will not bar relief. For one thing, the evidence provided by the recording materially alters the factual basis of the *Miranda* claim. The state court's decision without benefit of the recording was not "on the merits" and thus did not trigger § 2254(d). The federal court must therefore treat the claim *de novo* on the basis of facts developed in federal court. In these circumstances, it would be "bizarre" if the federal court were obliged to ignore facts properly established by clear and convincing proof in deference to a state decision based on incomplete, and in this instance misleading, evidence. Cf. *Wellons*, *supra*.

Alternatively, even if § 2254(d) remains in play, federal relief is still available. This is not because the state court unreasonably determined the facts in light of the evidence the state court saw. By hypothesis, the state court reasonably accepted the police officers' testimony that the defendant had voluntarily cooperated with them. Federal relief is permissible under § 2254(d)(1), because the federal

court has now lawfully found additional facts showing what really happened, notwithstanding what the state court reasonably thought was true on the evidence the state court had at the time.

2. The Warden's Interpretation of §2254(d)(1).

According to the warden's understanding of § 2254(d)(1) in this case, federal relief would *not* be permissible in this hypothetical—because the federal court's analysis under § 2254(d)(1) would preempt any consideration of the recording. By the warden's account, the federal court must first determine whether the state court's rejection of the *Miranda* claim was unreasonable in view of the state court record alone. Since it was not unreasonable for the state court to believe what the officers said at the state hearing, federal relief is foreclosed—notwithstanding the prisoner's offer to refute the officers' testimony with the recording. See Pet.Br. at 22-24 (asserting that a federal court's analysis under § 2254(d)(1) cannot take into account evidence outside the record on which the state court acted).

This is not the law. Section § 2254(d)(1) cannot be read to bar habeas relief when a routine analysis under § 2254(d)(2) and § 2254(e)(1) leads to the conclusion that relief is available. As noted previously, the evidence provided by the recording materially alters the factual basis of the *Miranda* claim. The state court's decision without consideration of the recording was not "on the merits" and thus did not trigger either § 2254(d)(2) or § 2254(d)(1). Even if § 2254(d)(1) is applicable,

federal relief is still permissible, because the new evidence supplied by the recording establishes that a judgment against the prisoner was unreasonable, given the true facts.

The hypothetical demonstrates that requiring a federal court always to undertake a § 2254(d)(1) analysis before anything else, and confining the court to the evidence that was before the state court, would not be *consistent* with § 2254(d)(2), as the warden maintains. Instead, restricting the federal court to the state record for purposes of the legal question under § 2254(d)(1) would *frustrate* the arrangements contemplated by § 2254(d)(2) and § 2254(e)(1) for deciding when the facts found on an incomplete record in state court may be proved erroneous by additional evidence in federal court.

The warden contends that it "makes no sense to say that a state court unreasonably applied clearly established ... law to facts it did not know existed." Pet.Br. at 17, quoting *Pinholster v. Ayers*, 590 F.3d at 688 (Kozinski, C.J., dissenting). But it *does* make sense to speak this way—that is, in the way Congress has actually spoken. Congress signaled the different functions served by § 2254(d)(1) and § 2254(d)(2) by specifying that only the evidence in state court is pertinent for purposes of § 2254(d)(2), but forgoing the same limitation with respect to § 2254(d)(1).

The facts for purposes of § 2254(d)(1) may therefore include facts supported by evidence outside the state record—provided that those facts have been developed consistent with the standards for federal fact-finding and § 2254(e)(2). Put simply, the facts

were the facts—whether the state court was aware of them or not. A decision applying the law to the facts may have been unreasonable wholly apart from what the state court knew at the time. And a federal court can make such a determination where, consistent with the rules governing (and severely restricting) federal fact-finding, the federal court develops a fuller understanding of what really happened.

The warden contends that "[t]o allow a federal court to reject a state-court adjudication based on facts never presented in the state court would make § 2254's 'exhaustion' rule pointless...." Pet.Br. at 25. Not so. The exhaustion doctrine is fully applicable to any new allegations of fact in federal court and may well require the federal court to postpone consideration of new evidence until currently available state avenues for determining the truth have been tried.

The warden argues that the availability of a federal hearing may encourage prisoners to play "bait and switch"—that is, to withhold evidence from a state court and proffer it later in federal court. Pet.Br. at 31. If the potential for "bait and switch" is genuine, the answer is not a contrived interpretation of § 2254(d)(1), but the straightforward application of § 2254(e)(2). In *any* habeas case, whether subject to § 2254(d)(1) or not, a prisoner can obtain a federal hearing into evidence that was not presented in state court *only* by demonstrating either that the facts were not developed in state court despite his or her diligent efforts or that one of the statutory standards in § 2254(e)(2) is satisfied. This is the way Congress has provided (explicitly and forthrightly) for cases in

which habeas applicants employ manipulative litigation tactics.[9]

III. THE CJLF'S ARGUMENT THAT § 2254(d)(1) IS A PRECLUSION RULE DEFIES THIS COURT'S SETTLED INTERPRETATION AND MISCONCEIVES BOTH § 2254(d)(1) AND THE LARGER AEDPA SCHEME OF WHICH IT IS A PART

The CJLF recognizes that the implications of the warden's position in this case can be defended only by a complete reconceptualization of § 2254(d)(1). According to the CJLF, § 2254(d)(1) is a "rule of preclusion" that is *supposed* to forestall fact-finding in federal court. Brief of the CJLF, at 5, 10-11.[10]

The CJLF declares that § 2254(d)(1) is "not a standard of review." Brief of the CJLF, at 5. But in

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[9] The warden borrows the "bait and switch" line from Chief Judge Kozinski below. See *Pinholster*, 590 F.3d at 690 (Kozinski, C.J., dissenting). But Judge Kozinski used this phrase in his debate with the *en banc* majority about whether Mr. Pinholster exercised the diligence required by § 2254(e)(2).

[10] The CJLF asserts that the "rule of preclusion" in § 2254(d)(1) is meant not only as a "limitation on relief," but also as a "limitation on *relitigation*." *Id.* at 9 (emphasis added). But the implication of the CJLF's position is that a federal court cannot inquire into factual disputes that were *not* previously litigated in state court, but are presented for the first time in federal court—factual disputes that, again, warrant a federal hearing that is not barred by § 2254(e)(2).

a series of decisions over the last fourteen years, this Court has repeatedly explained that a standard of review is precisely what § 2254(d)(1) *is*. E.g., *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003); *Ayers v. Belmonte*, 549 U.S. 7, 14 (2006). Chief Justice Roberts emphasized this understanding only last Term: "AEDPA ... imposes a 'highly deferential standard for evaluating state-court rulings.'" *Renico v. Lett*, ___ U.S. ___, ___, 130 S.Ct. 1855, 1862 (2010), quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997); see also *Lett*, *supra*, at 1862 n.1 (citing numerous other cases).

The operative effect of this deferential standard of review is not to foreclose federal consideration of a potentially meritorious claim, but to limit the availability of federal habeas *relief*. The Court has often explained that the "deference" rule established by § 2254(d)(1) draws the distinction between a decision by a state court that was correct and a decision that was incorrect (in the view of a federal habeas court), but not unreasonable. Only correct or nonetheless reasonable state court decisions bar federal relief. This is the way Congress has chosen to mitigate the tension between state and federal courts in close cases—not by telling federal courts that must always give preclusive effect to state court judgments.

This Court has said that 28 U.S.C. § 2244(b), governing second or successive federal petitions, is a "modified res judicata rule" *Felker v. Turpin*, 518 U.S. 651, 664 (1996). The CJLF asserts, without authority, that the "so-called 'deference' rule of § 2254(d) is a rule of the same class...." Brief of the

CJLF, at 8. But saying this does not make it so. By describing § 2244(b) as a kind of preclusion rule, while repeatedly explaining that § 2254(d)(1) establishes limitations on relief, the Court has indicated that the two are not the same, but quite different.

The notion that § 2254(d)(1) introduces preclusion into habeas corpus is revolutionary, to say the least.[11] If Congress meant to enact a preclusion rule, it would have done so explicitly. Floor speeches complaining of "delays" in habeas cases and "relitigation" scarcely justify reading into § 2254(d)(1) a general common law doctrine that Congress simply did not put there.

AEDPA *did* address perceived delays and inefficiencies in habeas litigation by, for example, establishing a statute of limitations and strict limits on second or successive petitions. And § 2254(e)(2) created important limits on federal hearings. These provisions, not § 2254(d)(1), plainly dealt with any difficulties entailed in federal fact-finding litigation.

The CJLF's only response is that there is "no reason" to conduct a federal hearing in any case subject to § 2254(d)(1), because, according to the CJLF, § 2254(d)(1) precludes consideration of any factual matters that such a hearing might uncover. *Id.* at 17. That is circular, lacking any baseline

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[11] The CJLF brief in this case largely incorporates the CJLF *amicus* brief in *McDaniel v. Brown*, __ U.S. ___, 130 S.Ct. 665 (2010). The Court, of course, decided *Brown* on the basis of conventional analysis.

explanation for *why* § 2254(d)(1) forecloses federal fact-finding apart from the CJLF's novel contention that § 2254(d)(1) is a preclusion rule.

The breadth of the CJLF's position invites reflection. Over the years, this Court has seen numerous arguments about § 2254(d)(1), which would extend this single provision's field of operation to matters far beyond its core function to calibrate the availability of federal relief. An expansive reach for § 2254(d)(1) necessarily entails a corresponding diminution in the work left for other AEDPA provisions that often are better suited to particular tasks. The argument the CJLF advances here illustrates that proposition: it would have § 2254(d)(1) deal with cases in which prisoners proffer evidence in federal court that was not presented in state court—the very thing that § 2254(e)(2) so plainly addresses.

Justice Kennedy saw this kind of thing coming a generation ago. Faced with an argument that a federal evidentiary hearing should be barred because of a prisoner's default regarding fact-finding in state court, Justice Kennedy explained that various other aspects of habeas law curbed abuses in this context and that it was unnecessary to add yet another restriction: "We ought not take steps which diminish the likelihood that [federal habeas courts] will base their legal decision on an accurate assessment of the facts." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 24 (1992) (Kennedy, J., dissenting).

AEDPA is an elaborate statutory scheme, whose many provisions have separate, though related, functions. The task is to give all those

provisions their due within an integrated framework consistent with the language Congress has enacted. No single provision must do all the work. It disrupts the congressional plan laid out in AEDPA to fasten an atextual interpretation on § 2254(d)(1) that requires a struggle to explain what remains to be governed by § 2254(e)(2).

The dangers of § 2254(d)(1) mission creep are exacerbated to the extent previous litigation in state court triggers § 2254(d)(1) without providing assurance that the state court carefully examined a claim and its supporting evidence under prevailing precedents and thus reached a decision on the merits that warrants confidence. It is not for nothing that the CJLF stakes its argument that a summary state disposition counts as an adjudication of the merits on the contention that § 2254(d)(1) is a "modified rule of issue preclusion." Brief for the CJLF in *Harrington v. Richter*, No. 09-587, at 13.

IV. NO POLICY CONSIDERATIONS JUSTIFY READING § 2254(d)(1) TO PREEMPT FEDERAL FACT-FINDING IN APPROPRIATE CASES

The warden attempts to buttress his position on policy grounds. Unnecessary hearings are said to be expensive. Pet.Br. at 13. And if an unjustified hearing is conducted before a federal court examines a prior state court decision, the federal court's appraisal of the state court's work on the basis of the state record may be "improperly influenced." *Id.* at 14.

Neither of these contentions is persuasive. There is no evidence that federal habeas courts systematically conduct hearings in violation of § 2254(e)(2) or that they overuse their lawful authority to engage in fact-finding. Federal hearings have always been extremely rare. *Keeney v. Tamayo-Reyes*, *supra*, at 24 (Kennedy, J., dissenting). They have become rarer still since § 2254(e)(2) was adopted in 1996. A recent study of habeas litigation in district courts reports that federal hearings were held in only 9.5% of the capital cases studied and in only .41% of the noncapital cases. Prior to AEDPA, the rates were 19% and 1.1%, respectively. "Executive Summary, Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996," at 5 (N. King, F. Cheesman & B. Ostrom) (Award No. 2006-IJ-CX-002, National Institute of Justice, Office of Justice Programs, United States Department of Justice).

CONCLUSION

The California Supreme Court did not adjudicate the respondent's claim on the merits. Accordingly, this case is not subject to 28 U.S.C. § 2254(d). Because the questions on which this Court granted review presuppose that § 2254(d) applies, the writ should be dismissed as improvidently granted.

With or without consideration of the new theories about the respondent's mental condition introduced in federal court, the circuit court's judgment that federal habeas relief is available and warranted in this case was correct and should be affirmed.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

VINCENT CULLEN, Acting Warden,
California State Prison at San Quentin,
Petitioner,

vs.

SCOTT LYNN PINHOLSTER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a federal court may reject a state-court adjudication of a petitioner's claim as "unreasonable" under 28 U. S. C. § 2254, and grant habeas corpus relief, based on facts never presented to the state court.

2. Whether a federal court may grant relief under 28 U. S. C. § 2254 on a claim that trial counsel in a capital case ineffectively failed to produce mitigating evidence of organic brain damage and a difficult childhood because counsel, who consulted with a psychiatrist who disclaimed any such diagnosis, as well as with the defendant and his mother, did not seek out a different psychiatrist and different family members.

This brief *amicus curiae* addresses only Question 1.

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IN THE

Supreme Court of the United States

VINCENT CULLEN, JR., Acting Warden,
California State Prison at San Quentin,
Petitioner,

vs.

SCOTT LYNN PINHOLSTER,
Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

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1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

The habeas corpus reform of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was enacted to reduce the relitigation in federal court of cases already fairly considered and decided in state courts. The central reform of AEDPA was the enactment of 28 U. S. C. § 2254(d), protecting the reasonable decisions of state courts from second-guessing by the lower federal courts.

In the present case, the federal courts permitted the petitioner to relitigate an issue already reasonably decided by the state court and bring in new evidence never presented to the state court. The Ninth Circuit then declared the state court decision to be an unreasonable application of federal law to facts never presented to that court. This kind of undercutting of § 2254(d) has become routine in many federal courts. It requires extended relitigation of cases that should be dismissed at the threshold. It is contrary to both the letter and purpose of the governing Act of Congress, and it is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On January 9, 1982, during the course of a home burglary, petitioner Scott Lynn Pinholster stabbed to death Robert Beckett. *People* v. *Pinholster*, 1 Cal. 4th 865, 903-904, 824 P. 2d 571, 582-583 (1992), disapproved in part on other grounds in *People* v. *Williams*, 49 Cal. 4th 405, 459 (2010). Another victim, Thomas Johnson, was also murdered by one of Pinholster's accomplices. *Id.*, at 904, 824 P. 2d, at 583. The jury convicted Pinholster of two counts of first-degree murder. *Id.*, at 902, 824 P. 2d, at 581.

The state sought the death penalty. In preparation for the penalty phase of the trial, Pinholster's defense

team consulted with psychiatrist Dr. John M. Stalberg, who concluded that Pinholster did not suffer from any mental disorder or defect aside from antisocial personality disorder. *Pinholster* v. *Ayers*, 590 F. 3d 651, 657-658 (CA9 2009). At the penalty proceeding, Pinholster's defense team elected not to call Dr. Stalberg as a witness, instead presenting Pinholster's mother, who testified that as a child, Pinholster had a troubled relationship with his stepfather, suffered some head injuries, and spent some time in a state hospital for being emotionally handicapped. 1 Cal. 4th, at 910-911, 824 P. 2d, at 587. "The jury fixed the penalty at death." *Id.*, at 903, 824 P. 2d, at 582. The California Supreme Court affirmed on direct appeal, in a unanimous opinion by Justice Stanley Mosk. *Id.*, at 975, 824 P. 2d, at 631.

Pinholster then filed a state habeas petition claiming, relevant to the issues here, ineffective assistance of counsel at the penalty stage of his trial for his defense team's failure to adequately investigate his mental health. 590 F. 3d, at 659. The petition attacked Dr. Stalberg's conclusions as incompetent and cursory, and presented the testimony of a new expert, Dr. George Woods, who indicated that Pinholster suffered from bipolar disorder and epilepsy. *Ibid.* On July 9, 1995, the California Supreme Court denied the petition "on the substantive ground that it is without merit." App. to Pet. for Cert. 302.

In 1997, Pinholster filed a federal habeas petition, resurrecting Dr. Stalberg as his mental health expert. 590 F. 3d, at 659. Dr. Stalberg now asserted that he would have made further inquiry into the possibility of medical disorders if trial counsel had provided him with more information about Pinholster's background. *Id.*, at 659-660. Because the federal petition contained new material facts and unexhausted claims, the District

Court dismissed the unexhausted claims and held the remainder of Pinholster's petition in abeyance. *Id.*, at 660. Pinholster filed a second state habeas petition in the California Supreme Court, which the court denied "on the substantive ground that it is without merit." App. to Pet. for Cert. 300-301. The claim at issue here, the third claim in the petition, was also denied on the grounds that it was both untimely and successive.

Pinholster returned to federal court, where, applying pre-AEDPA law, the District Court granted Pinholster an evidentiary hearing on his penalty phase ineffective assistance of counsel claim. 590 F. 3d, at 660. At the hearing, Pinholster offered two new mental health experts, Dr. Donald Olson and Dr. Sophia Vinogradov, who opined that Pinholster suffered from brain damage as a result of childhood and later-life head trauma. *Id.*, at 660-661. Pinholster also presented for the first time additional mitigating evidence related to his upbringing. *Ibid.* In light of this evidence, the District Court granted Pinholster's petition based on trial counsel's ineffective assistance during the penalty phase. *Id.*, at 661.

The same day, this Court decided in *Woodford* v. *Garceau*, 538 U. S. 202, 207 (2003), that AEDPA does apply in circumstances similar to Pinholster's, contrary to Ninth Circuit precedent. In an addendum to its order, the District Court found that AEDPA review did not affect Pinholster's entitlement to a federal evidentiary hearing or habeas relief on his claim. *Pinholster*, 590 F. 3d, at 661. This conclusion was not based on an application of § 2254(d). Rather, it was based on an assertion that the California Supreme Court did not adjudicate the claim, *ibid.*, despite the fact that the court twice rejected penalty phase ineffective assistance claims expressly on the merits. *Id.*, at 661.

A Ninth Circuit panel reversed the District Court's grant of habeas relief. *Pinholster* v. *Ayers*, 525 F. 3d 742 (CA9 2008). The Court of Appeals then granted rehearing *en banc* and affirmed. *Pinholster*, 590 F. 3d, at 661-662. The court held that a district court's determination of the reasonableness of the state court decision under 28 U. S. C. § 2254(d) is not limited to the evidence presented to the state court. *Id.*, at 666. Rather, review of the reasonableness of the state court's decision should be determined *after* considering any additional evidence presented during a federal evidentiary hearing properly held pursuant to § 2254(e)(2). *Id.*, at 666-668. As related to Pinholster's claim, the Ninth Circuit held that the District Court neither erred in granting him an evidentiary hearing, *id.*, at 668, nor in granting him habeas relief on the substantive ineffective assistance claim. *Id.*, at 684.

This Court granted certiorari on June 14, 2010.

SUMMARY OF ARGUMENT

The language, the nature, and the purpose of 28 U. S. C. § 2254(d) all indicate that the issue presented by this subsection should be resolved on the state court record, before any factfinding by the federal court.

Section 2254(d) is a not a standard of review. It is a rule of preclusion based on a prior adjudication, in the same category as *res judicata*. The exception for unreasonable application of clearly established law cannot depend on facts never presented to the state court.

So understood, § 2254(d) is in harmony with § 2254(e)(2). Neither contradicts the other or renders the other superfluous. Section 2254(e)(2) is a default rule, largely codifying pre-AEDPA case law, that forbids

an evidentiary hearing in certain circumstances where § 2254(d) does not resolve the claim. For example, the *Brady* claim in *Michael Williams* v. *Taylor* was not resolved by § 2254(d) because there was no adjudication on the merits in state court, but an evidentiary hearing was barred by § 2254(e)(2).

Where a claim is barred by § 2254(d) on the face of the state court record, it is an abuse of discretion to authorize discovery or conduct an evidentiary hearing. Such unnecessary delay is a violation of the rights of the victims under 18 U. S. C. § 3771.

When the state court has denied a petition on the merits without an evidentiary hearing, the § 2254(d)(1) question should be answered assuming all genuinely disputed facts alleged in the state court in the petitioner's favor. If the denial of the petition with that assumption was unreasonable, the bar of § 2254(d) is lifted, and the petitioner must prove his case on the merits as before AEDPA.

When the state court has denied the initial petition on the merits and denied a successive petition as both successive and meritless, § 2254(d) applies to both merits rulings. If either denial is reasonable based on the facts alleged in that petition, § 2254(d) bars relief.

The statement of *Wiggins* v. *Smith* that penalty phase prejudice exists if "there is a reasonable probability that one juror would have struck a different balance" does not apply to California. One juror cannot veto a death sentence under California's symmetrical unanimity statute. The focus should be on the jury as a whole, not individual jurors. Evidence considered weak to irrelevant by many or most jurors is unlikely to have swayed an entire jury to switch from a death verdict to a life-in-prison verdict.

ARGUMENT

I. The § 2254(d)(1) question should be decided on the state court record, before taking any additional evidence.

A. The Nature of § 2254(d).

In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress added subdivision (d) to 28 U. S. C. § 2254 as a new limitation on the power of federal courts to overturn state criminal judgments via the writ of habeas corpus. This new limitation was not, as some contended, a mere codification or even expansion of the preexisting retroactivity rule of *Teague* v. *Lane*, 489 U. S. 288 (1989). *Teague* and § 2254(d) are distinct inquiries. See *Horn* v. *Banks*, 536 U. S. 266, 272 (2002) (*per curiam*).

The new limitation abrogated the pre-AEDPA, post-1953 rule of independent review, taking the step the Court considered but did not take in *Wright* v. *West*, 505 U. S. 277 (1992). See *Terry Williams* v. *Taylor*, 529 U. S. 362, 400-402 (2000) (O'Connor, J., concurring in part); *id.*, at 410-412 (opinion of the Court). This new limitation was not unprecedented, however. It was a return to the kind of limitation that existed in case law before 1953.

Before *Brown* v. *Allen*, 344 U. S. 443 (1953), a federal petition by a state prisoner who had exhausted state remedies was considered to be analogous to a successive federal petition by a federal prisoner. Three years earlier, the Court explained the status of a prior state decision in *Darr* v. *Burford*, 339 U. S. 200, 215 (1950) (emphasis added):

> "Even after this Court has declined to review a state judgment denying relief, other federal courts have power to act on a new application by the prisoner.[40]

> On that application, the court may require a showing of the record and action on prior applications, *and may decline to examine further into the merits because they have already been decided against the petitioner.*[41]

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40. *Ex parte Royall*, 117 U. S. 241 [1886].

41. *Salinger* v. *Loisel*, [265 U. S. 224 (1924)]."

The *Salinger* case cited for the last proposition is a federal successive petition case. See *Salinger* v. *Loisel*, 265 U. S. 224, 226-228 (1924). In AEDPA, Congress abrogated the *Brown* "independent judgment" rule and restored the basic concept of pre-*Brown* law as explained in *Darr*. The so-called "deference" rule of § 2254(d) is a rule of the same class as the successive petition rules of §§ 2244(b) and 2255(h)—"a modified res judicata rule." Cf. *Felker* v. *Turpin*, 518 U. S. 651, 664 (1996). The new statute does not restore the pre-1953 rule in its original, open-ended form, though. Consistently with other developments in the law of habeas corpus, it replaces the discretionary rule with "more complex procedural principles that regularize and thereby narrow the discretion that individual judges can freely exercise." See *Lonchar* v. *Thomas*, 517 U. S. 314, 322 (1996). The language at the top of subdivision (d) establishes a general rule forbidding relitigation of issues decided on the merits by the state court, and the two numbered paragraphs make exceptions to that general rule. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 946, 957-958 (1998).

The central purpose of the habeas reform of AEDPA is abundantly clear from the debates. It is to expedite the resolution of habeas corpus petitions, particularly in capital cases. The supporters of reform invariably

bolstered their arguments with horror stories of unconscionable delays. See 141 Cong. Rec. 14,734, col. 1 (1995) (statement of Sen. Feinstein); *id.*, at 15,062, cols. 1-2 (statement of Sen. Hatch); *id.*, at 15,019 (statement of Sen. Specter); *id.*, at 15,036-15,037 (statement of Sen. Nickles).

> "After all, State courts are constrained to uphold the Constitution and faithfully apply Federal law as well. There is simply no reason that Federal courts should have the ability to *virtually retry cases* that have been properly adjudicated by our State courts. There is no reason to allow Federal courts to do that." *Id.*, at 15,062, col. 3 (statement of Sen. Hatch) (emphasis added).

The primary sponsor of § 2254(d) saw it as not only a limitation on relief but also as a limitation on relitigation. This is a rule about respecting the outcome of a previous adjudication, in the same category as res judicata and law of the case. See Scheidegger, *supra*, 98 Colum. L. Rev., at 946; see also *id.*, at 911-917. A substantial part of its value lies in protecting the party who has already prevailed on the merits from the burden and delay of having to litigate those merits over again. It is not enough for that party to win the second battle over the same turf; in most cases he should not have to fight the second battle at all. See *Allen* v. *McCurry*, 449 U. S. 90, 94 (1980) ("relieve parties of the cost and vexation of multiple lawsuits").

Respect for the intent of Congress and the purpose of the AEDPA therefore favors addressing the § 2254(d) question at the threshold. Specifically addressing § 2254(d), Senator Hatch noted, "Now, Federal habeas corpus proceedings have become, in effect, a second round of appeals in which convicted criminals are afforded the opportunity to *relitigate* claims already considered and rejected by the State courts." 141

Cong. Rec. 15,062, col. 2 (1995) (emphasis added); see also K. Scheidegger, Overdue Process: A Study of Federal Habeas Corpus in Capital Cases and a Proposal for Reform 27-28 (1995), available at http://www.cjlf.org/publctns/OverdueProcess.pdf.

In *Terry Williams*, 529 U. S., at 386, Justice Stevens acknowledged that, "Congress wished to curb delays, *to prevent 'retrials'* on federal habeas, and to give effect to state convictions to the extent possible under law." (Opinion concurring in the judgment) (emphasis added). The opinion of the Court noted, "That acknowledgment is correct and significant to this case. It cannot be disputed that Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved." *Id.*, at 404.

For § 2254(d)(1) to achieve its purpose, it is not enough to preclude relief; it must preclude relitigation. The state's primary interest in habeas reform was not to block relief in cases where it is warranted. Rather, it was to reduce the "burden of federal relitigation of state decisions . . . ." S. O'Connor, Local Control of Crime, Address to the Attorney General's Crime Summit 5 (Mar. 4, 1991), reprinted in Habeas Corpus Issues: Hearings before the House Subcommittee on Civil and Constitutional Rights, Serial No. 39, 102d Cong., 1st Sess., 192, 197 (1991). In habeas, as in immunity, once the respondent is forced to litigate the question, much of the value of the protection is lost. Cf. *Mitchell* v. *Forsyth*, 472 U. S. 511, 526 (1985).

B. Decision on the State Court Record.

As noted in *Darr*, *supra*, 339 U. S., at 215, a decision to "decline to examine further into the merits because they have already been decided against the petitioner" normally requires examination of the "record and

action" in the prior proceeding and nothing more. This is true as well under AEDPA.

The threshold requirement for § 2254(d) to apply is that the state court decision must be on the merits. That determination obviously must be made from the state court decision itself, and when there is a written opinion it generally presents little difficulty. Summary dispositions may require reference to lower court decisions, see *Ylst* v. *Nunnemaker*, 501 U. S. 797, 803 (1991), or to the briefs. See *Coleman* v. *Thompson*, 501 U. S. 722, 740 (1991) (state court granted motion to dismiss, motion based solely on state procedure). When there is no lower court decision, as in the present case, the state court decision is still a decision on the merits, though, and § 2254(d) still applies. See Brief for Criminal Justice Legal Foundation in *Harrington* v. *Richter*, No. 09-587.

When the petitioner claims the "unreasonable determination of the facts" exception of § 2254(d)(2), the statute is explicit that this determination is based on "the evidence presented in the State court proceeding." *Miller-El* v. *Dretke*, 545 U. S. 231, 241-242, n. 2 (2005), confirmed that the evidence to be considered is limited in this way, while distinguishing "theories about that evidence." The "contrary to" portion of paragraph (1) refers to the state court's selection of the governing rule, see *Terry Williams*, 529 U. S., at 405-406, or "if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court." See *id.*, at 406. Both of those inquiries necessarily depend on the facts before the state court, and only those facts.

That leaves the "unreasonable application" clause. "[W]hen a state-court decision unreasonably applies the law of this Court *to the facts* of a prisoner's case, a federal court applying § 2254(d)(1) may conclude that

the state-court decision falls within that provision's 'unreasonable application' clause." *Terry Williams*, 529 U. S., at 409. What facts? It would make no sense to speak of "unreasonable application" to facts never presented to the court. See 590 F. 3d, at 688 (Kozinski, C. J., dissenting). This must refer to facts that have been reasonably found under § 2254(d)(2), are undisputed, or have been alleged by the petitioner and assumed to be true for the purpose of disposition without factfinding. It cannot refer to evidence never presented in any form to the state court.

We can put to one side, for now, the scenario where a state court decides a claim on the merits but refuses to consider the petitioner's evidence. A claim along those lines was alleged in a case before this Court two years ago, but the allegation was false. See Tr. of Oral Arg. in *Bell* v. *Kelly*, No. 07-1223, pp. 4-5. A procedurally unreasonable determination of facts might fit within § 2254(d)(2). The Court can decide that issue when a case actually presents it.

When the state court record shows a decision on the merits after either a reasonable fact-finding process or an assumption of genuinely disputed material facts in the petitioner's favor, the § 2254(d)(1) question should be decided solely on the state court record. New evidence is not relevant to the decision, and the delay caused by hearing it is contrary to the core purpose of AEDPA.

C. Relation to § 2254(e)(2).

Treating § 2254(d) as a threshold issue does not render § 2254(e)(2) superfluous. Cf. Brief in Opposition 39. Properly understood, each subdivision has a role to play. *Holland* v. *Jackson*, 542 U. S. 649, 652 (2004) (*per curiam*), recognized that "whether a state court's decision was unreasonable must be assessed in light of

the record the court had before it." However, in the next paragraph the *Holland* opinion muddies this clear language with a reference to § 2254(e)(2). *Bradshaw* v. *Richey*, 546 U. S. 74, 79 (2005), is similar. The confusion arises from a failure to recognize that subdivisions (d) and (e) are distinct rules.

As discussed *supra*, at 8, § 2254(d) is a "modified res judicata rule." By its terms, it applies only to claims "adjudicated on the merits in State court proceedings . . . ." Paragraph (e)(2), in contrast, is a procedural default rule. In *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1, 5-6 (1992), the Court overruled *Townsend* v. *Sain*, 372 U. S. 293 (1963), on the question of when a federal court must hold an evidentiary hearing for evidence not presented to the state court. The *Keeney* dissent maintained that the decision was inconsistent with the pre-AEDPA subdivision (d) of § 2254, regarding the presumption of correctness of state findings of facts. See 504 U. S., at 12, 20-23 (opinion of O'Connor, J.).

In AEDPA, Congress resolved the tension in favor of the *Keeney* majority opinion by repealing the former subdivision (d) and enacting the new subdivision (e). Paragraph (e)(1), like former subdivision (d), addresses the presumption of correctness when the state court has found the facts. Paragraph (e)(2), like *Townsend* and *Keeney*, addresses the default situation where the defendant fails to present the facts to the state court. See *Michael Williams* v. *Taylor*, 529 U. S. 420, 433-435 (2000) (discussing § 2254(e)(2) as a partial codification of *Keeney*).

Paragraph (e)(2) can come into play in two different scenarios, as illustrated by *Keeney* and *Michael Williams*. In *Keeney*, the petitioner made his claim in state court but made an inadequate factual showing, and the state court denied his claim on the merits. See 504 U. S., at 3-4. In *Michael Williams*, the petitioner raised

three new claims on federal habeas based on facts not known to him at the time of his state habeas proceeding. See 529 U. S., at 427.

In the *Keeney* situation, an evidentiary hearing would usually be barred both by § 2254(e)(2) and by a denial of relief under § 2254(d) based on the state court record alone, but not always. If the state court found the facts reasonably based on the evidence the petitioner presented, but then chose the wrong standard of law to apply, § 2254(d) would not bar relief. See *Terry Williams*, 529 U. S., at 405-406. However, if the petitioner left out evidence through a lack of diligence and did not qualify for one of § 2254(e)(2)'s exceptions, an evidentiary hearing would be barred, and the federal court's decision would be limited to *de novo* application of the correct standard to the facts proved in state court.

The *Williams* scenario is different. Michael Williams never presented his *Brady*[2] claim to the state court. See 529 U. S., at 427. Hence, there was no state court decision on the merits, and § 2254(d) did not apply. However, because the facts were readily available to petitioner at the time of the state habeas proceeding and neither of § 2254(e)(2)'s exceptions applied, no evidentiary hearing on this claim was permitted in federal habeas. See *id.*, at 437-440.

In cases where § 2254(e)(2) bars an evidentiary hearing by itself, without overlap with § 2254(d), relief will often also be barred by the nonstatutory procedural default rule. That fact does not render § 2254(e)(2) superfluous for several reasons. First, the procedural default rule does not necessarily protect the state from the burden and delay of retrying the facts before the

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2. *Brady* v. *Maryland*, 373 U. S. 83 (1963).

federal court rules on the default question. As discussed *supra*, at 9, protection from this burden is an important aspect of habeas reform, independent of protection from an erroneous ultimate judgment. Second, the default rule has loopholes that allow many defaulted claims in. Section 2254(e)(2) does not depend on the state default rule being "adequate." Cf. *Lee* v. *Kemna*, 534 U. S. 362, 376 (2002) (noting exceptions); see also Scheidegger & Gede, The Inadequate Jurisprudence of Adequate State Grounds, 11 Engage No. 2 (forthcoming Aug. 2010) (discussing confused state of this area of the law). Indeed, California's default rules are brushed aside so routinely by the Ninth Circuit, see, *e.g.*, *Townsend* v. *Knowles*, 562 F. 3d 1200, 1206-1208 (CA9 2009);[3] Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Philip Morris USA* v. *Williams*, No. 07-1216, pp. 4-7, that for all practical purposes the state remains under the discredited regime of *Fay* v. *Noia*, 372 U. S. 391 (1963), overruled in *Coleman* v. *Thompson*, 501 U. S. 722 (1991).

The exceptions to § 2254(e)(2) for defaulted facts are more stringent than the caselaw exceptions for defaulted claims. See *Michael Williams*, 529 U. S., at 433-434. A petitioner who is allowed to bring a defaulted claim for any of several reasons may nonetheless have had a fair opportunity to establish the factual basis of the claim in state court. For example, if the trial court admitted an out-of-court statement over a hearsay objection after finding it was a dying declaration, a petitioner who is permitted to raise a Confrontation Clause claim on federal habeas (*e.g.*, because the state default rule is deemed "inadequate") should not also be excused from a failure to introduce evidence refuting

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3. The correctness of *Townsend* is presently before this Court in *Walker* v. *Martin*, No. 09-996.

the status of the statement as a dying declaration. See *Giles* v. *California*, 554 U. S. __, 128 S. Ct. 2678, 2684-2685, 171 L. Ed. 2d 488, 497-498 (2008) (noting dying declaration as established exception to confrontation right).

In summary, § 2254(e)(2) is an independent bar on evidentiary hearings in certain circumstances of default by the petitioner. It does not, by negative implication, authorize a hearing in those circumstances where it does not bar one. Whether a hearing is required, discretionary, or prohibited in those other circumstances must be determined by reference to other rules of law. One of those other rules, *amicus* submits, is that the State is entitled to a ruling under § 2254(d) on the state court record, *before* being burdened with any fact-finding procedures, for any claim that was decided on the merits by the state court.

D. Discretion and Limits.

Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules") permits the district judge to expand the record, and Habeas Rule 8 directs the judge "to determine whether an evidentiary hearing is warranted." Neither rule indicates when these steps are warranted.

Schriro v. *Landrigan*, 550 U. S. 465, 468-469 (2007), was a case where the District Court denied an evidentiary hearing and the Court of Appeals held that a hearing was mandatory. The case therefore directly addresses only the limit on the court's discretion to deny a hearing, not the limit on the court's discretion to grant one. *Landrigan* discusses how AEDPA changed the factors to be considered without directly altering the judge's authority. See *id.*, at 473-474. The Court then continues, "It follows that if the record refutes the applicant's factual allegations or *otherwise precludes*

habeas relief, a district court is not *required* to hold an evidentiary hearing." *Id.*, at 474 (emphasis added). This holding implements AEDPA's purpose of reducing delays in execution. See *id.*, at 475.

This passage in *Landrigan* emphasizes factual findings that dispose of the claim because that was the situation presented by the case. As a matter of historical fact, Landrigan had forbidden all mitigating evidence, and that fact precluded any possibility of establishing prejudice under *Strickland* v. *Washington*, 466 U. S. 668 (1984). See 550 U. S., at 477. However, the "otherwise precludes" language indicates that the principle is not limited to dispositive facts. A reasonable application of the correct precedent to the facts before the state court "otherwise precludes habeas relief" on that claim. Therefore, the District Court is not *required* to take new evidence on a claim if the state court decided that claim on the merits and neither exception to § 2254(d) applies.

Is a district court *permitted* to hold a hearing on such a claim? There is no reason to hold one. If the claim is precluded by § 2254(d) on the basis of the state record, no facts introduced in federal court can lift that bar. A hearing would be an unnecessary delay and a waste of resources. An unnecessary delay is an unreasonable delay and therefore a violation of the rights of the victims. See 18 U. S. C. §§ 3771(a)(7), (b)(2)(A), (b)(2)(D).

The present case is procedurally unusual in that the District Court held the evidentiary hearing in the belief that AEDPA did not apply, based on circuit precedent that was overruled after the hearing but before the District Court's final decision. Even so, it is worth noting what the correct procedure would have been if the District Court had been applying AEDPA from the beginning.

The correct procedure is to decide whether the § 2254(d) exceptions apply or not based solely on the record in state court. That record may be expanded if necessary to add material missing from it but necessary for understanding the state court proceedings, but not with additional evidence on the merits never presented to the state courts. If no § 2254(d) exception applies, the claim should be finally denied at that point. If an exception does apply, petitioner has cleared that hurdle and must now establish his claim on the merits, just as before AEDPA. If a hearing is needed for that purpose and not precluded by § 2254(e)(2), the court should hold one.

Conceivably, there might be a case where a state court acts unreasonably in summarily deciding material factual questions against the petitioner despite a proffer of solid evidence. When and if that case arises, the Court can consider whether § 2254(d)(2) provides relief. This is not that case. The § 2254(d) question should have been decided solely on the record of proceedings in the state court, and receipt of evidence outside that record would have been an abuse of discretion if the District Court had been applying AEDPA from the start. Even after the erroneous receipt of that evidence, it remained irrelevant to the question to be decided under § 2254(d). Once the applicability of AEDPA was clarified, the District Court should have evaluated the reasonableness of the state court decision solely on the evidence proffered to the state court.

II. A state court decision without an evidentiary hearing or findings of fact should be evaluated assuming genuinely disputed facts in the petitioner's favor.

As discussed, *supra*, at 12, one of the exceptions to the issue preclusion bar of § 2254(d) is unreasonable application of the law to the facts of the case. Where a state court decision is rendered without an evidentiary hearing or findings of facts—and where, as here, there is no prior state court decision to look to—there are no factual findings.

In California, upon submission of a petition for writ of habeas corpus, "a court must first determine whether the petition states a prima facie case for relief—that is, whether it states facts that, if true, entitle the petitioner to relief . . . ." *People* v. *Romero*, 8 Cal. 4th 728, 737, 883 P. 2d 388, 391 (1994). If the court finds no prima facie case has been stated, the court will summarily deny the petition. *People* v. *Duvall*, 9 Cal. 4th 464, 475, 886 P. 2d 1252, 1258 (1995). The issuance of such a summary denial (where the denial is not based on procedural grounds) is an indication that the court has considered the petition, accepted its factual allegations as true, and concluded that the petition fails to state grounds for relief. See *In re Clark*, 5 Cal. 4th 750, 769, 855 P. 2d 729, 741, n. 9 (1993); *In re Robbins*, 18 Cal. 4th 770, 814, n. 35, 959 P. 2d 311, 340, n. 4 (1998). No further pleadings or fact-finding process is required because, even if the petitioner were granted the opportunity to prove his claim, his claim fails as a matter of law.[4]

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4. Federal law similarly contemplates dismissal of collateral review without an evidentiary hearing in appropriate cases. See Rules Governing Section 2255 Proceedings for the United States District Courts, Rules 4(b) and 8(a).

Thus, on federal habeas review, the first question before the District Court is whether, based on the evidence proffered by the petitioner to the state court and assuming in the petitioner's favor all genuinely disputed facts, does the state court's summary dismissal fail the standard of § 2254(d)(1)?[5] If the disputed facts are accepted as presented by the petitioner, and the petition nevertheless fails to state a claim upon which habeas relief can be granted, or if the state court could reasonably so find, there is no need for the federal court to go any further. Even if the petitioner were given an opportunity to prove his factual allegations—and succeeded in doing so—the law would still not afford him a remedy. If, on the other hand, the disputed facts as proffered by the petitioner state a claim for relief, and the state court's contrary holding via summary dismissal of the petition is an unreasonable application of clearly established federal law, then the bar of § 2254(d) is lifted and the petitioner is entitled to an opportunity to prove his claim based on the actual facts.

In this case, the California Supreme Court disposed of Pinholster's penalty phase ineffective assistance of counsel claim with a summary dismissal. See App. to Pet. for Cert. 302. In accordance with California's habeas procedure outlined above, this means that the court accepted as true all facts proffered by Pinholster in his petition and determined that, even if true, Pinholster's allegations failed to state a claim for ineffective assistance of counsel entitling him to relief. The threshold question for the District Court should have been whether, based on Pinholster's allegations,

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5. Naturally, § 2254(d)(2)'s "decision based on an unreasonable determination of the facts" is inapplicable in cases where the state court dismissed the case without conducting an evidentiary evidentiary hearing or making findings of fact and there are no prior factual findings on the points at issue.

the summary dismissal precluded federal relief under subdivision (d). Only if the answer to that question is "no" should the habeas court proceed to the question of whether an evidentiary hearing is permitted under § 2254(e)(2) and Habeas Rule 8.

As discussed in Part I-C, *supra*, at 12-16, § 2254(e)(2) becomes relevant at this point to determine if an evidentiary hearing is barred by that provision. If not, and if an evidentiary hearing is "warranted" under Habeas Rule 8, then § 2254(e)(1) will apply to any relevant factual findings made by the state courts at any point in the proceedings. "[T]he § 2254(e)(1) presumption of correctness applies regardless of whether there has been an 'adjudication on the merits' for purposes of § 2254(d)." *Nara* v. *Frank*, 488 F. 3d 187, 200-201 (CA3 2007).

In summary, then, when the state habeas petition has been denied on the merits without factual findings and no other bar to relief applies, the federal habeas court should proceed along these steps:

1) Determine whether the allegations in petitioner's *state* habeas petition would, if true, so clearly entitle him to relief under established law that the contrary conclusion is unreasonable. If not, deny the claim under § 2254(d).

2) If the claim is not denied at Step 1, determine whether an evidentiary hearing is barred by § 2254(e)(2).

3) If not, determine whether an evidentiary hearing is "warranted" under Habeas Rule 8, a determination largely unchanged from pre-AEDPA law.

4) If so, conduct the hearing and decide the material facts, applying the § 2254(e)(1) presumption and burden of proof to any facts previously determined by a state court.

5) Apply the law to the facts found or presumed and decide the claim on the merits.

The Court of Appeals in this case erred at step one, holding that the District Court could properly take evidence never presented to the state court in deciding whether the state court's decision was a reasonable application of the law to the facts. *Pinholster*, 590 F. 3d, at 666-668. That holding should be expressly disapproved.[6]

III. An initial state court decision on the merits, if reasonable on the facts proved or proffered, continues to bar federal habeas relief notwithstanding a later decision on both procedural grounds and the merits.

In deciding *which* California Supreme Court decision to evaluate under 28 U. S. C. § 2254(d), the Court of Appeals stated simply that "[t]he relevant state court decision is the last reasoned decision regarding a claim . . . ." 590 F. 3d, at 662. The authority cited for this proposition is *Barker* v. *Fleming*, 423 F. 3d 1085, 1091 (CA9 2005), which in turn relies on *Ylst* v. *Nunnemaker*, 501 U. S. 797, 803-804 (1991). *Barker* and *Nunnemaker* were both decided in different contexts, and even in its original context the *Nunnemaker* rule is not that simple. A deeper analysis is required.

Barker is easily distinguished. In that case, the Washington Court of Appeals dismissed a state collateral review petition, the petitioner sought review in the Washington Supreme Court, and that court denied review with an opinion. See *Barker*, 423 F. 3d, at 1091. Where the second opinion is that of a higher court reviewing the decision of a lower court, the proposition

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6. See *infra*, at 29, regarding the alternative holding. *Id.*, at 669.

that only the last opinion need be considered is straightforward, see *id.*, at 1091-1093, at least where the opinion decides the merits.[7]

Nunnemaker predates AEDPA and deals with procedural defaults rather than § 2254(d), but the principles involved in that decision illuminate the present problem. Generally, if a state defendant fails to make his federal claim when, where, and how state law requires, and if the state court rejects his subsequent attempt to make that claim on that basis, then he cannot make the claim in federal habeas unless an exception applies. See *Coleman* v. *Thompson*, 501 U. S. 722, 729-730 (1991). The procedural default still bars federal review even if the state "reach[ed] the merits of a federal claim in an *alternative* holding." *Harris* v. *Reed*, 489 U. S. 255, 264, n. 10 (1989) (emphasis in original).

A state court may deny a claim on the ground that it has been denied before, and petitioner has not met the criteria state law sets for a second bite at the apple. Such a denial's "effect upon the availability of federal habeas is nil . . . ." *Nunnemaker*, 501 U. S., at 804, n. 3. If the claim was previously defaulted, it remains defaulted, but if it was not, its rejection as successive does not create a default. See *Cone* v. *Bell*, 556 U. S. __, 129 S. Ct. 1769, 1781, 173 L. Ed. 2d 701, 716 (2009).

What was true for the procedural default bar before AEDPA (and still is) should also be true for the modi-

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7. Occasionally individual Justices of this Court write opinions "respecting denial of certiorari" explaining why a case is not appropriate for discretionary review. See, *e.g.*, *N. C. P. Marketing Group, Inc.* v. *B G Star Productions, Inc.*, 129 S. Ct. 1577, 1578, 173 L. Ed. 2d 1028, 1029 (2009) (statement of Kennedy, J.). If a state court denied discretionary review with such an opinion, that would call for application of the *Nunnemaker* "look through" rule.

fied issue preclusion bar after AEDPA. That is, a state court's rejection of a claim on the ground it was previously decided on the merits against the petitioner should have no effect on the application of § 2254(d) in federal habeas. If the prior merits decision reasonably applied the correct rule to the facts *then* before the state court, § 2254(d) bars federal habeas relief. It would defeat the purpose of the statute if the petitioner could do an end-run around that bar simply by filing a successive petition and having it rejected as successive.

In the present case, the claim of ineffective assistance in the penalty phase was the third claim of the successive petition. This claim was rejected on the merits as well as on the grounds that it was untimely and successive.[8] See App. to Pet. for Cert. 300-301. The court even went so far as to cite the "alternative holding" footnote of *Harris* v. *Reed*, *supra*.

If denial as successive alone would be insufficient to lift a § 2254(d) bar from the prior denial on the merits, should an *alternative* holding that the new petition is still without merit lift that bar? The *Harris* footnote is not controlling, but it is strongly analogous. The *Harris* Court sought to make clear that "a state court may reach a federal question without sacrificing its interests in finality, federalism, and comity." 489 U. S., at 264, n. 10.

A state needs a strong successive petition rule, particularly in capital cases. The right of the victims to a timely conclusion of the post-judgment proceedings cannot be upheld without one. See Cal. Const., Art. I, § 28(b)(9); cf. 18 U. S. C. § 3771(a)(7). Further, in too

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8. Successive collateral review petitions are likely to also be untimely. In the federal syatem, for example, few motions that are "second or successive" within the meaning of 28 U. S. C. § 2255(h) will be filed within the year allowed by § 2255(f).

many federal courts any failure to invoke the successive petition rule may be used against the state in other cases under a pointlessly severe interpretation of the "adequate state grounds" doctrine. See Brief for California, *et al.*, as *Amici Curiae* in *Beard* v. *Kindler*, No. 08-992, p. 12.

At the same time, though, an alternative holding that the petition is still without merit provides an assurance to the public that justice is not being lost in "technicalities." Where such an alternative holding can be made without unduly prolonging the proceedings, federal law ought not deprive the State of a defense for its judgment that it would otherwise have, as *Harris* recognized in the procedural default context.

In this scenario, the habeas petitioner received two decisions on the merits by the state court, even though he was only entitled to one. Which one needs to be a reasonable application of clearly established federal law in order to preclude federal habeas relief? Either one.

By its terms, § 2254(d) bars federal relief on a claim adjudicated on the merits in state court unless an exception applies. Where a second adjudication is a review of a prior one by a higher court, it makes sense to look only at the later adjudication. This is true whether the second adjudication is an appeal designated as such or a successive habeas petition used as an appeal in practice, even though not in name. See *Carey* v. *Saffold*, 536 U. S. 214, 221-222 (2002) (describing California practice).

Where the second adjudication on the merits is simply a second adjudication rather than a review, nothing in the text or purpose of § 2254(d) requires that the issue-preclusion effect of the first adjudication be superseded. One of the primary purposes of AEDPA was to reduce the number of reviews of capital cases.

Supporters filled the Congressional Record with absurdly long case histories, showing repeated reviews of the same judgment, far exceeding any need to ensure basic fairness. See, *e.g.*, 141 Cong. Rec. 15,018-15,020 (1995) (statement of Sen. Specter); 142 Cong. Rec. 7574-7575 (1996) (statement of Sen. Gorton). To reward a petitioner for delaying proceedings with an unnecessary successive petition in state court would be contrary to the central purpose of the statute.

Pinholster contends that the California Supreme Court's summary denial of his ineffective assistance claim was an unreasonable application of the rule of *Strickland* v. *Washington*, 466 U. S. 668 (1984), to the facts he proffered to the state court. See Brief in Opposition 24. He would have to establish that as to *both* adjudications to escape the bar of § 2254(d).[9] If he cannot, a federal court has no authority to disturb the judgment.

IV. The "one juror" standard for assessing penalty-phase prejudice does not apply to California.

At the beginning of its prejudice assessment, the Court of Appeals said this regarding the standard to be applied:

> "Regarding prejudice at capital sentencing, 'the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' [*Strickland* v. *Washington*, 466 U. S. 668, 695 (1984).] . . . [G]iven California's

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9. See *infra*, at 29.

> requirement that a unanimous jury impose any death sentence, *see* CAL. PENAL CODE § 190.4(b), our inquiry is whether, based on the sum of this evidence, '*there is a reasonable probability that at least one juror would have struck a different balance*,' *Wiggins*, 539 U. S. at 537 (emphasis added)." 590 F. 3d, at 674-675.

The Court of Appeals was fundamentally mistaken. The symmetrical California rule that the jury must be unanimous *either way* is very different from the one-sided Maryland rule in *Wiggins*. In Maryland, a hung penalty jury results in a life sentence, see Md. Crim. L. Code § 2-303(j)(2), effectively allowing the opinion of one juror to prevail over the contrary views of eleven jurors. A "different result" in Maryland therefore requires only that one juror "would have struck a different balance" *and* would have held out against the contrary views of the others.[10]

Allowing a single holdout to trump the considered views of the remainder of the jurors has produced grievous miscarriages of justice, such as the inadequate punishment imposed upon the "20th hijacker," Zacharias Moussaoui. See Dwyer, One Juror Between Terrorist and Death, Washington Post, May 12, 2006, p. A1. The people of California have wisely decided not to go that route.

> "If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable

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10. *Wiggins* did not consider the latter requirement. Whether this statement in *Wiggins* should be modified even in a single-juror veto state such as Maryland can be considered in a case that presents the issue.

> to reach a unanimous verdict as to what a penalty shall be, the court in its discretion shall either order a new jury or impose the punishment of confinement in a state prison for a term of life without the possibility of parole." Cal. Penal Code § 190.4(b).

It is not unusual for the second jury to return a unanimous death verdict. See, *e.g.*, *People* v. *Bonilla*, 41 Cal. 4th 313, 320, 160 P. 3d 84, 89 (2007).

A "different result" in California requires not only that "one juror would have struck a different balance" and held out to the point of producing a hung jury but also that the proceedings that follow do not produce a death sentence. That is, either the district attorney decides to stop seeking the death penalty, the second jury is unanimous for a life sentence, or the second jury is also hung and the judge decides not to summon a third.

The rule that a hung jury produces a second trial and not a life sentence also makes it less likely that a juror who initially favors a life sentence will hold out. In the Moussaoui case, the dissenting juror simply refused to deliberate. See Dwyer, *supra*. A true, symmetrical unanimity requirement makes such behavior less likely, as jurors typically do not want to see their invested time go for naught.

In a state such as California, then, the focus of the prejudice question should be on the jury as a whole, not an individual juror. Would the evidence in question have had a reasonable probability of convincing the jury that voted unanimously for a death sentence to instead have voted unanimously for a life sentence? That would require powerful evidence.

Evidence that is regarded as substantially mitigating by some people but is regarded as having little or no weight by a great many others is particularly unlikely

to swing a jury from unanimous one way to unanimous the other. The "bad childhood" defense falls squarely in this category. One survey of capital jurors found that over three-fifths would give no mitigating weight at all to claims of childhood abuse, and a whopping 85% would give no mitigating weight at all to claims of childhood poverty. See Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 Colum. L. Rev. 1538, 1559 (1998).[11]

For the reasons explained in the Brief for the Petitioner, the Brief for Pennsylvania et al. as *Amici Curiae*, Judge Tallman's opinion for the panel majority, and Chief Judge Kozinski's en banc dissent, the additional evidence that Pinholster claims counsel should have presented does not meet the *Strickland* requirement of a reasonable probability of a different result. Both of the California Supreme Court's denials of relief on the merits were not only "reasonable" within the meaning of 28 U. S. C. § 2254(d), they were correct.

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11. Present constitutional doctrine requires consideration (and extensive, expensive litigation) of mitigating factors that jurors give little weight but not of the mitigating factor that jurors give greatest weight—residual doubt of guilt. See *id.*, at 1563, *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion), *Oregon* v. *Guzek*, 546 U. S. 517, 523-524 (2006). In an appropriate case, the whole line of constitutionally required mitigation should be rethought. See generally Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in Support of the Petition for Writ of Certiorari in *Schriro* v. *Styers*, No. 08-1350

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

August, 2010

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-1088

In the Supreme Court of the United States

VINCENT CULLEN, ACTING WARDEN OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN,

Petitioner,

v.

SCOTT LYNN PINHOLSTER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF DISABILITY RIGHTS LEGAL CENTER AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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BRIEF OF DISABILITY RIGHTS LEGAL CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The Disability Rights Legal Center (DRLC) is a non-profit organization dedicated to promoting the rights of people with disabilities and to heightening public awareness of those rights by providing legal and related services.[1] DRLC accomplishes its mission through programs that include the Cancer Legal Resource Center (a joint program with Loyola Law School), the Education Advocacy Program, the Education and Outreach Program, and the Civil Rights Litigation Program. Since 1975, DRLC has handled countless disability rights cases under state and federal civil rights laws challenging discriminatory practices by government, business, and educational institutions. In addition, the DRLC has frequently appeared as an *amicus curiae* in this Court and other courts in cases of particular significance to people with disabilities.

The DRLC's interest in the present case arises from the disproportionate incidence of organic brain damage and related mental disabilities among capital defendants. Although a mental disability frequently is an important mitigating circumstance – as is the trauma that often underlies the condition – persons with mental disabilities are often ill-

[1] No counsel for a party authored this brief in whole or in part and no person other than the amicus and its counsel made a monetary contribution to its preparation or submission. See S. Ct. R. 37.6. Copies of the parties' written consents to the filing of this brief have been filed with the Clerk. See S. Ct. R. 37.3(a).

equipped to assist counsel in their penalty-phase defense; they often cannot accurately report the nature and history of their condition, their symptoms, their upbringing, or their experience. The problem is compounded by similar reporting deficiencies in family members. Among those with mental disabilities who have dysfunctional families whose conduct may have contributed to the disabling condition, family members often have incentives to provide incomplete or inaccurate reports of a defendant's history and the extent of his disability. A full and fair defense at the capital sentencing stage consequently depends in large part on the nature and satisfaction of counsel's duty to investigate a defendant's history and symptoms, and to seek expert evaluation based on the fruits of a full investigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

In resolving the questions presented here, this Court should bear in mind the disproportionate incidence of mental disabilities among the relatively few persons ultimately subjected to capital trials. On the surface, those capital defendants are least likely to impress prosecutors as candidates for leniency. And the same goes for sentencing fact-finders – at least if the defendants' disabilities and the often-horrific circumstances that caused them remain unknown as a result of an inadequate investigation.

That is why this Court has recognized that the Constitution requires counsel to conduct a reasonable investigation of a capital defendant's social, medical, and psychological history. That investigation is necessary for several reasons. To begin with, the historical information itself may have a direct mitigating effect, as in cases of severe childhood abuse. But

the most complete history also is necessary both to obtain an accurate diagnosis of any disabilities and to decide whether to pursue additional and more focused professional opinions as potential evidence at the sentencing phase. It is not always reasonable to stop at the first professional opinion, particularly if that opinion is based on materially incomplete data.

This case illustrates why a constitutionally reasonable investigation cannot simply skim the surface of the capital defendant's life by consulting only a parent and conducting only a superficial consultation with an expert—especially if that consultation is compromised because the expert lacks the information needed to properly evaluate the defendant's condition. By failing to obtain readily available records of the defendant's injuries, abuse, and treatment (as Pinholster's trial counsel did), counsel obviously precludes the possibility of presenting that evidence directly at the penalty phase.

But the same failure has the additional and equally significant consequence of necessarily undercutting (and perhaps rendering entirely useless) any expert evaluation of potential mental disability that counsel may obtain. And the consequences may continue to prejudice the defendant even on collateral review: an expert presented with incomplete evidence who concludes that a defendant lacks a significant mental impairment may evaluate the omitted evidence through a different lens than one who viewed the totality of the evidence at the outset.

Because the question on habeas corpus ultimately is whether a state court reasonably determined that counsel's failure to investigate was reasonable or did not prejudice the defendant, see *Strickland* v. *Washington*, 466 U.S. 668, 686 (1984); *Williams* v.

Taylor, 529 U.S. 362, 407–409 (2000), a federal court sitting in habeas must focus on the evidence presented to the state court. As consistent practice after the Anti-Terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2262 *et seq.*, reflects, however, that does not mean that *no* new evidence may enter the analysis.

For at least two reasons, a bright-line rule limiting review to the cold record of the state court proceedings makes no sense. First, state post-conviction proceedings often are summary, with at best a terse paper record. Federal courts on habeas properly permit more complete presentations of the same arguments presented to the state court, including live and complete witness examinations. Second, it may have been unreasonable for the state court to summarily deny post-conviction relief based on the truncated evidence that can be presented in a summary proceeding without permitting full evidentiary development. Yet a federal court may not be able to evaluate the prejudicial significance of that failure without the benefit of more complete expert analysis. And there are other situations in which new evidence—albeit confined to the same arguments presented in state court—is absolutely necessary in a federal habeas proceeding. For example, an expert witness may become unavailable for further testimony or cross-examination. For all these reasons, the Court should not impose a *per se* bar on the presentation of additional evidence in habeas proceedings.

ARGUMENT

This case rests on established and fundamental constitutional principles. The Sixth Amendment right to effective assistance of counsel extends to the penalty phase of a capital trial. At that stage, the

right to effective assistance imposes on counsel an "obligation to conduct a thorough investigation of the defendant's background" (*Williams*, 529 U.S. at 396) in order to develop and present mitigation evidence that would support a sentence of less than death—an obligation that rests on standards in effect before Pinholster was tried. *See ibid.* (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary at 4-55 (2d ed. 1980)). In particular, as this Court recently and unanimously observed, counsel must exert a reasonable effort to "uncover and present *any evidence* of [a defendant's] mental health or mental impairment, his family background, or his military service." *Porter* v. *McCollum*, 130 S. Ct. 447, 453 (2009) (per curiam) (emphasis added). Counsel cannot settle for "rudimentary knowledge" of the defendant's background, *Wiggins* v. *Smith*, 539 U.S. 510, 524 (2003), but rather must affirmatively seek out school and medical records for facts—such as the defendant's childhood trauma or early symptoms—that could have a mitigating effect at sentencing. *Id.* at 522, 524, 527.

A. A Reasonable Application of the Constitutional Duty to Investigate Mitigating History Should Take Into Account the Prevalence and Effects of Mental Disabilities Among Capital Defendants.

The Court has repeatedly acted to ensure that a defendant's mental impairments do not in themselves increase his exposure to a capital sentence, which constitutionally "must be limited to those offenders * * * whose extreme culpability makes them 'the most deserving of execution.'" *Roper* v. *Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins* v. *Virginia*, 536 U.S. 304, 319 (2002)). Defendants who are "less

able to give meaningful assistance to their counsel" face an increased "risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" *Atkins*, 536 U.S. at 320 (quoting *Lockett* v. *Ohio*, 438 U.S. 586, 605 (1978)). Mental impairments—even the delayed development associated with youth—may lead not only to "impulsiveness," but to "reluctance to trust defense counsel," which in turn can impede the of representation. *Graham* v. *Florida*, 130 S. Ct. 2011, 2032 (2010). And while a mental impairment such as that associated with organic brain damage may not categorically exclude a defendant from eligibility for the death penalty, the lesser disability could significantly affect a fact-finder's perception of both the defendant's degree of culpability and the value of retribution in a particular circumstance. Cf. *Roper*, 543 U.S. at 572 (noting reduced "retribution [and] deterrence" interests for "juvenile offenders"); *Atkins*, 536 U.S. at 319 (noting "lesser culpability of the mentally retarded offender"); *Ford* v. *Wainwright*, 477 U.S. 399, 407-408 (1986) (insane offenders). As this Court specifically recognized, a "troubled history" that includes "diminished mental capacities" is acutely "relevant to assessing a defendant's moral culpability" in a capital case. *Wiggins*, 539 U.S. at 535.

Yet a jury cannot make the proper evaluation of culpability unless it is presented with evidence of the defendant's impairment. And capital defendants are unusually likely to have mental impairments.

Victims of head trauma are far more likely than the general population to land on death row: studies estimate that from 25 to 87 percent of the death row inmates have a history of head injuries, compared to

8.5 percent of the general population.[2] Some reasons for this overrepresentation are understood. Death row inmates are far more likely to show damage to the frontal lobes, which form part of the "pre-frontal cortex" or PFC.[3] See *Sears* v. *Upton*, 130 S. Ct. 3259, 3262–3263 (2010) (per curiam) (noting functional consequences of frontal lobe abnormalities). Indeed, "an extensive literature links PFC damage with im-

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[2] See Robert E. Morrell *et al.*, *Traumatic Brain Injury In Prisoners*, 27 J. OFFENDER REHAB. 1, 1–8 (1988) (24.9% of inmates interviewed suffered from traumatic brain injury); Bill Slaughter *et al.*, *Traumatic Brain Injury In A County Jail Population: Prevalence, Neuropsychological Functioning And Psychiatric Disorders*, 17 BRAIN INJURY 731, 734 (2003) (77% of sample inmate population suffered from traumatic brain injury); Jonathan M. Silver *et al.*, *The Association Between Head Injuries And Psychiatric Disorders: Findings From The New Haven NIMH Epidemiologic Catchment Area Study*, 15 BRAIN INJURY 935, 938–939 (2001) (8.5% of general population suffers from traumatic brain injury). See also John M. Fabian, *Neuropsychological and Neurological Correlates in Violent and Homicidal Offenders: A Legal and Neuroscience* Perspective, 15 AGGRESSION AND VIOLENT BEHAV. 209, 211 (2010) ("[Y]oung adult males from socially deprived backgrounds are most likely to suffer significant head injuries," "the same group prone to engage in juvenile delinquency and adult criminality.") (internal citations omitted). Dorothy O. Lewis *et al.*, *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 584 (1988); Dorothy O. Lewis *et al.*, *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838 (1986).

[3] See generally Sharon L. Thompson Schill *et al.*, *The Frontal Lobes and the Regulation of Mental Activity*, 15 CURRENT OPINION IN NEUROBIOLOGY 219 (2005).

pulse control, antisocial behaviour and criminality."[4] Consequently, scientists "now consider the realm of PFC dysfunction most relevant to legal matters, namely, when the frontal cortex is damaged."[5]

The PFC regulates impulse control, risk assessment, and evaluation of risk and reward.[6] As a consequence, PFC injuries "may result in an inability to maintain emotional equilibrium, and an inability to

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[4] Robert M. Sapolsky, *The Frontal Cortex and the Criminal Justice System*, 359 PHIL. TRANSACTIONS OF THE ROYAL SOC'Y OF LONDON B 1787, 1793 (2004). See also Earl K. Miller & Jonathan D. Cohen, *An Integrative Theory of Prefrontal Cortex Function*, 24 ANNUAL REV. OF NEUROSCIENCE 167 (2001); M.C. Brower & Bill Price, *Neuropsychiatry Of Frontal Lobe Dysfunction In Violent And Criminal Behaviour: A Critical Review*, 71 J. NEUROL. NEUROSURG. PSYCHIATRY 720 (2001) (reviewing literature); Thomas Nyffeler & Marianne Regard, *Kleptomania In A Patient With A Right Frontolimbic Lesion*, 14 NEUROPSYCHIATRY NEUROPSYCHOL. BEHAV. NEUROL. 73 (2001) (reviewing literature); Fabian, *supra*, 15 AGGRESSION AND VIOLENT BEHAVIOR at 211 ("Impairments within the prefrontal brain regions may in part cause a biological vulnerability to impulsive aggression by limiting the capacity to inhibit subcortical emotional centers.")

[5] See Sapolsky, *supra*, 359 PHIL. TRANSACTIONS OF THE ROYAL SOC'Y OF LONDON B at 1793.

[6] See Antoine Bechara *et al.*, *Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 BRAIN 2189, 2198-2199 (2000) (impulse control); Facundo Manes *et al.*, *Decision-Making Processes Following Damage to the Prefrontal Cortex*, 125 BRAIN 624 (2002) (risk assessment); John P. O'Doherty *et al.*, *Abstract Reward and Punishment Representations in the Human Orbitofrontal Cortex*, 4 NATURE NEUROSCI. 95 (2001) (risk and reward); Robert D. Rogers et al., *Choosing Between Small, Likely Rewards and Large, Unlikely Rewards Activates Inferior and Orbital Prefrontal Cortex*, 20 J. NEUROSCI. 9029 (1999) (same).

control the behavioral expression of mood changes; the usual capacity to mediate between intellect and emotion breaks down."[7] Childhood or adolescent damage to the PFC may have particularly profound effects on these characteristics because the PFC (and the brain more generally) continues to develop into early adulthood.[8] When PFC damage "occurs at earlier ages, executive function is impaired and the impulsivity takes on a more global and malign nature."[9]

The causes of organic brain damage are diverse. Organic brain injury of course may result from the childhood abuse so often associated with severe criminal behavior. But it can also result from service in combat. Two different studies have found that a fifth of the veterans of the nation's most recent conflicts have suffered traumatic brain injuries.[10] *E. Porter*,

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[7] Keith A. Hawkins & Krista K. Trobst, *Frontal Lobe Dysfunction and Aggression: Conceptual Issues and Research Findings*, 5 AGGRESSION AND VIOLENT BEHAVIOR 147, 151 (2000). See also Harold V. Hall, *Criminal-Forensic Neuropsychology of Disorders of Executive Functions* in DISORDERS OF EXECUTIVE FUNCTION: CIVIL AND CRIMINAL LAW APPLICATIONS 37 (H.V. Hall & R.J. Sbordone eds., 1993).

[8] Sapolsky, *supra*, 359 PHIL. TRANSACTIONS OF THE ROYAL SOC'Y OF LONDON B at 1792 ("[B]rain development is far more prolonged [than previously believed] and, not surprisingly, the PFC is the last region of the brain to fully myelinate. Remarkably, this process extends well beyond adolescence into early adulthood."); see also Tomas Paus *et al.*, *Structural Maturation of Neural Pathways in Children and Adolescents: In Vivo Study*, 283 SCIENCE 1908 (1999).

[9] *Id.* at 1793.

[10] See RAND Corporation: Center for Military Health Policy Research, *Invisible Wounds of War: Psychological and Cognitive Injuries, Their Consequences, and Services to Assist Recovery*, at tbl. 1.1 (T. Tanielian & L.H. Jaycox eds., 2008) (19.5%); Heidi

130 S. Ct. at 454 (noting both "heroic military service" and "brain abnormality"). No legal principle should impede the full vindication of Sixth Amendment rights for those whose mental disability results from service to their country, but that would be a consequence of the position urged by the petitioner.

The very brain injuries associated with serious criminal behavior also impede legal representation because they hinder a defendant's ability to communicate with his attorney. As with the habeas petitioner in *Rompilla* v. *Beard*, 545 U.S. 374 (2005), such a defendant's "contributions to any mitigation case" are likely to be "minimal." *Id.* at 381.

Organic brain damage and traumatic brain injury impair communication skills by reducing the ability to understand the nuances of conversation or to speak with enough detail to sustain a conversation.[11] Brain injury also commonly decreases problem-solving ability and "impair[s the] ability to maintain mental set (*i.e.*, to keep a goal and requisite steps in mind)."[12] Persons with brain damage often "cannot go beyond the literal meaning of utterances, not being able to understand what is implied" and are "differently impaired in the production of linguistic communication acts; for example in producing

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Terrio *et al.*, *Traumatic Brain Injury Screening: Preliminary Findings in a US Army Brigade Combat Team*, 24(1) J. HEAD TRAUMA REHAB. 14 (2009) (22.8%).

[11] See R. Angeleri et al., *Communicative Impairment In Traumatic Brain Injury: A Complete Pragmatic Assessment*, 107 BRAIN & LANGUAGE 229, 230–231 (2008).

[12] Hawkins & Trobst, *supra*, 5 AGGRESSION AND VIOLENT BEHAV. at 151.

correct requests or giving the interlocutor sufficiently detailed information" to maintain a conversation.[13]

This impaired ability to communicate is particularly significant for defendants who were abused as children. Abuse victims often cannot provide their counsel with detailed or accurate information about the traumas they suffered (much less their effects). Not only may the mechanisms of memory obliterate recollection of the trauma itself, but victims of childhood abuse may also experience "defensiveness, shame, [or] repression" regarding episodes of abuse.[14] Consequently, victims are often hesitant to disclose mental or physical abuse by a family member.[15] Add to this the physical impairment of a brain injury, and defendants facing the most serious crimes are the ones most likely to be hindered in communicating the most significant mitigating evidence from their life histories.

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[13] Angeleri, *supra*, 107 BRAIN & LANGUAGE at 230. See also Skye McDonald, *Pragmatic Language Skills After Closed Head Injury: Ability to Meet the Informational Needs of the Listener*, 11 BRAIN & LANGUAGE 28, 43 (1993) ("[I]n a significant proportion of nonaphasic CHI (closed head injury) patients there are major long-term disturbances of communication competence in everyday situations. * * * CHI subjects had substantial difficulty meeting the informational needs of the listener.").

[14] Alan M. Goldstein *et al.*, *Assessing Childhood Trauma and Developmental Factors as Mitigation in Capital Cases*, in FORENSIC MENTAL HEALTH ASSESSMENT OF CHILDREN AND ADOLESCENTS 365, 373 (Steven N. Sparta & Gerald P. Koocher eds., 2006) (describing why defendants' testimony about their own abusive childhoods may be unreliable).

[15] See generally Kenneth B. Dekleva, *Psychiatric Expertise in the Sentencing Phase of Capital Murder Cases*, 29 J. AM. ACAD. PSYCHIATRY & L. 58, 61 (2001).

Because a large proportion of capital defendants have some type of mental impairment, it is critically important that the Court enforce meaningful standards for investigating and presenting mitigating evidence of mental impairment in particular, of brain damage and the abuse or other trauma that caused it. The same brain damage and history of childhood abuse that so often diminish a defendant's capacity for moral deliberation and decision-making also impair his ability to assist in his own defense. The effects of that impairment are particularly acute at the penalty phase, where the specifics of a defendant's disabilities and history of trauma may provide the weightiest mitigation evidence.

B. The Failure to Discover Historical Evidence Of Abuse And Brain Trauma Rendered The Assistance of Pinholster's Counsel Unconstitutionally Ineffective Under Established Law.

What Pinholster's trial counsel failed to discover was undeniably significant: the very "childhood history of physical abuse * * * and * * * brain abnormality" that were dispositive in *Porter*, 130 S. Ct. at 454; see also *Rompilla*, 545 U.S. at 392. Evidence of this kind can be critical to a jury deciding whether a defendant should live or die. As this Court has held, a jury *must* consider the mitigating effect of factors such as "childhood neglect and abandonment" and "real problems with impulse control apparently resulting from central nervous damage combined with * * * [a defendant's] background." *Abdul-Kabir* v. *Quarterman*, 550 U.S. 233, 240 (2007) (internal quotation marks omitted).

Without an adequate investigation, there can be no "reliability in the determination that death is the

appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). As this Court unanimously recognized just last Term, an attorney must review medical, school, and other types of records that could contain evidence of mental and emotional impairments that may cast doubt on the defendant's moral or legal culpability. See *Porter*, 130 S. Ct. at 455 (finding prejudice in counsel's unreasonable failure to find and present evidence "regarding the existence of a brain abnormality and cognitive defects").

Counsel's obligation to fully investigate is particularly strong when, as here, counsel knows that the defendant suffered significant head injuries as a child. See *Wiggins*, 539 U.S. at 524–525. If counsel had been alerted to the possibility that a defendant may have a significant disability (such as organic brain damage), a federal court on habeas properly considers what a reasonable investigation *would* have produced, *ibid.*, as well as what expert testimony *could* have been developed with that information in hand.

Yet Pinholster's trial counsel did not obtain or review his medical records even after they learned that Pinholster's mother—the only family member they interviewed—ran over him at the age of two, causing extensive head injuries, and that his head went through a windshield in a separate auto accident a few years later. Pet. App. 10a–11a, 50a, 239a, 277a–278a. The failure to follow up on this known history prevented trial counsel from discovering that these repeated head traumas resulted in damage to his frontal lobes, causing organic brain damage. Cf. *Sears*, 130 S. Ct. at 3262. The reasonably available evidence also would have revealed that Pinholster

had an abnormal neurological exam when he was only 9 years old, that he was committed to a mental hospital for five months at the tender age of 11, and that on his release from the hospital the treating physician recommended that he be placed in a foster home rather than returned to his mother and abusive stepfather. Pet. App. 11a–12a, 275a. Cf. *Sears*, 130 S. Ct. at 3262.

As this case further confirms, a constitutionally sufficient investigation of the defendant's history must adequately rule out the possibility of childhood or other abuse that might provide persuasive and moving evidence in mitigation. At a minimum, counsel's investigation of the defendant's youth must extend beyond an interview with a single family member. Studies have demonstrated that even non-abusing family members often feel guilt or responsibility for the abuse, and their accounts should not be regarded as accurate without corroborating evidence. See Goldstein, *supra*, at 373. Nor is it likely that family members who were responsible for (or passively witnessed) the abuse will volunteer it to outside lawyers. Family members may promote a "benign conception" of a defendant's "upbringing" when in fact the defendant and his siblings "lived in terror." *Rompilla*, 545 U.S. at 391–392 (internal quotation marks and citation omitted).

The testimony of Pinholster's mother provides a striking example. Her portrayal of his youth glossed over the family's abject poverty and Pinholster's subjection to "the most frequent and violent beatings" by his stepfather, who used a two-by-four and other implements. Pet. App. 55a–57a. She also neglected to mention regular beatings administered his grandmother (her mother) beginning in Pinholster's second

year. Pet. App. 272a. A reasonable investigation would have shown that many of Pinholster's siblings also have exhibited severe mental illness and criminal behavior, a strong indication that their common upbringing was severely deficient. Pet. App. 16a-17a, 58a-59a, 239a. No reasonable investigation of family history can stop with the interview of a single witness, much less when available records would have made that witness's benign version of events unsustainable.

The prejudice resulting from the failure to present such evidence is palpable. As the Court recognized last Term, evidence of this kind may not have made a capital defendant "any more likable to the jury, but it might well have helped the jury understand [him], and his horrendous acts—especially in light of his purportedly stable upbringing." *Sears*, 130 S. Ct. at 3264. That evidence certainly raises a "reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537. And that would have been enough. See CAL. PENAL CODE § 190.4(b) (requiring unanimous jury for death sentence).

C. A Federal Habeas Court May Consider New Evidence Addressing How Counsel's Failure to Provide a Defendant's Mental, Psychological and Social History to Evaluating Experts Foreclosed Otherwise-Available Options for Expert Mitigation Evidence.

A gross failure to investigate a defendant's background deprives the defendant of evidence that could weigh in favor of mitigation on its own. And "a constitutionally deficient mitigation investigation * * * at the very least[] call[s] into question the reasonableness" of the mitigation theory, strategy and tactics

the counsel chose without full information. *Sears*, 130 S. Ct. at 3265

But the failure to investigate is especially harmful because it ensures that any medical or mental health expert witness will not have all information that may be necessary to reach an accurate diagnosis. That significantly undercuts the value of any evaluation that counsel may have obtained, and also taints any decision not to pursue additional opinions. An opinion based on incomplete facts not only is constitutionally insufficient, but it does not provide a constitutionally sufficient basis to seek no further evaluations. See *Wiggins*, 539 U.S. at 532; *Rompilla*, 545 U.S. at 382.

Here, trial counsel's failure to investigate the circumstances of Pinholster's childhood prevented Dr. Stalberg, the only expert they consulted, from having the full range of information necessary to make a competent diagnosis. When these records were belatedly provided to Dr. Stalberg, he acknowledged that they contained "voluminous mitigating evidence," including evidence of "repeated head trauma," "brain damage," "a childhood of physical abuse, emotional neglect, and a family history of mental illness and criminal behavior." See Pet. App. 211a 212a. Regardless of his ultimate opinion, his recognition of those circumstances would have provided a strong impetus to seek additional consultation. Counsel who receives a narrowly unfavorable report from an expert presented with significant historical evidence of disability and abuse is far more likely to seek out a second opinion than one who receives a report that the defendant altogether lacks the symptoms or history of significant mental disability.

Counsel who fails to investigate a defendant's background deprives his client of one of the most important sources of mitigating evidence—the expert testimony of medical professionals. Moreover, if an expert *does* form an opinion based on deficient and incomplete evidence, that expert's viewpoint may be incurably tainted. That compounds the effect of the original ineffective assistance by making it more difficult to secure collateral relief in light of the original expert's adherence to his original position notwithstanding the new evidence.

These multiple and related prejudicial consequences underscore why habeas petitioners should not be categorically precluded from offering additional professional perspectives on the evidence of the defendant's medical, psychological, educational, and social history that was not available at trial. Nor should the often-restricted and summary scope of state collateral review categorically limit the habeas court's ability to consider additional professional perspectives on how the overlooked historical evidence could have affected the development of additional mitigation testimony. Additional perspectives are just that: they do not change what should have been discovered, but they clarify the significance of what was missed, by further elucidating what additional mitigating evidence might have resulted from a constitutionally effective investigation. Just as the investigation and evaluation of a defendant's social and medical history should not be cut short, neither should a federal habeas court's evaluation of the significance of trial counsel's shortcomings in developing a mitigation case.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

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AMICUS CURIAE BRIEF

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IN THE
Supreme Court of the United States

VINCENT CULLEN, ACTING WARDEN OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN,
Petitioner

v.

SCOTT LYNN PINHOLSTER,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF PENNSYLVANIA, ALABAMA, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, MONTANA, NEVADA, NEW MEXICO, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a federal court may reject a state-court adjudication of a petitioner's claim as "unreasonable" under 28 U.S.C. § 2254, and thus grant *habeas corpus* relief, based on a factual predicate for the claim that the petitioner could have presented to the state court but did not.

2. Whether a federal court may grant relief under 28 U.S.C. § 2254 on a claim that trial counsel in a capital case ineffectively failed to produce mitigating evidence of organic brain damage and a difficult childhood because counsel, who consulted with a psychiatrist who disclaimed any such diagnosis, as well as with petitioner and his mother, did not seek out a different psychiatrist and different family members.

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INTEREST OF *AMICI CURIAE*

Amici, the Commonwealth of Pennsylvania and seventeen other States, have an abiding interest in the proper construction and application of the standard for *habeas corpus* relief prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), because that standard preserves the proper balance of state and federal interests served by principles of comity. Rigorous enforcement of AEDPA's deferential standard, which permits *habeas* relief only where a state court's ruling on the merits of a claim is contrary to, or an unreasonable application of the then-existing clearly-established controlling precedent of this Court, *see* 28 U.S.C. § 2254(d)(1), not only promotes finality and the preservation of properly-rendered state court adjudications but also serves other interests important to the States' administration of criminal justice.

The sheer volume of ineffectiveness claims that nowadays are being pursued in capital and non-capital cases alike makes it all the more essential that state court rulings be evaluated correctly under AEDPA. Where a State is ordered to retry a defendant or to conduct a new sentencing hearing based on a *habeas* court's improperly-skewed review of an ineffectiveness claim, it is not only unjust because the State hasn't received its due under AEDPA, but it is also unduly burdensome. A State which finds itself in that unhappy situation is forced, for no valid reason, to deal with all of the traditional difficulties associated with repeating a court proceeding that took place in the distant past, *e.g.*, dead or incapacitated witnesses, dimmed memories, retrieval of evidence, and also with a significant outlay of its resources. To

have to shoulder that burden simply because a reviewing federal court has failed to adhere to this Court's repeated instructions about how to review ineffectiveness claims is unsupportable. Where, as here, an erroneous evaluation of a claim is compounded by the fact that relief was based, in significant part, upon facts that the district court was not entitled to consider because the petitioner did not present them to the state courts, although he could have, it is even more unfair.[1]

Finally, the States have an interest in seeing that the decisions of their many jurists who take seriously their shared responsibilities to interpret the Constitution and to safeguard the rights of citizens are afforded proper respect. *See Miller v. Fenton*, 474 U.S. 104, 111 (1985) (noting the "coequal" authority of this state court to interpret the Constitution). The state courts have not hesitated to grant relief on ineffectiveness claims when appropriate. *See, e.g., Commonwealth v. Smith*, 995 A.2d 1143 (Pa. 2010) (capital defendant awarded new penalty hearing based on trial counsel's ineffectiveness); *Commonwealth v. Cooper*, 941 A.2d 655 (Pa. 2007)(same); *Commonwealth v. Collins*, 888 A.2d 564 (Pa. 2005)(same); *Commonwealth v. Zook*, 887 A.2d 1218 (Pa. 2005)(same); *Commonwealth v. Chmiel*, 639 A.2d 9 (Pa. 1994)(capital defendant awarded new trial based on trial counsel's ineffectiveness);

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[1] Although this brief addresses only the latter of the issues presented in the petition for *certiorari*, *amici* agree with California and other *amicus curiae*, the Criminal Justice Legal Foundation, that it was error for the court of appeals to affirm the district court's grant of the writ because relief was improperly based on factual material that could have, and should have, been presented to the state courts, but was not.

Commonwealth v. Perry, 644 A.2d 705 (Pa. 1994)(same).

SUMMARY OF ARGUMENT

The *en banc* ruling of the court of appeals, which affirmed the district court's issuance of a writ of *habeas corpus* on the ground that trial counsel was ineffective for not presenting evidence of organic brain damage and childhood difficulties during the penalty phase of respondent's capital murder trial, is flawed for several reasons. Although the court of appeals' decision recognized that this case is subject to AEDPA's deferential standard, and that this Court's decision in *Strickland v. Washington*, 466 U.S. 688 (1984) also required "highly deferential" scrutiny of counsel's performance, it did not give effect to those principles.

Instead of conducting a proper review of whether the state court's ruling denying relief on this claim was an unreasonable application of *Strickland*, the *en banc* court of appeals essentially engaged in a *de novo* analysis of both prongs of the *Strickland* test for ineffectiveness and pronounced the state court ruling "unreasonable" in both respects because it didn't reach the same conclusions. The *en banc* court's evaluation of *Strickland*'s performance prong was marred by its undue reliance on American Bar Association (ABA) guidelines as the measure of constitutionally-adequate representation.

In contrast, the earlier panel decision of the court correctly recognized that review of respondent's ineffectiveness claim was governed by AEDPA and that, in keeping with the same, its role was not to substitute its judgment for state court's examination of the merits of that claim. Rather, it rightly understood that its very different responsibility was

to assess whether the state court's decision denying relief constituted an unreasonable application of *Strickland*. Looking at the issue of prejudice from this perspective, the panel majority concluded that, based on the record which was before it, the California Supreme Court decision did not reflect an unreasonable application of *Strickland*. Given the record that was before the state court, it could legitimately conclude there was no reasonable probability of a different outcome had the evidence respondent maintains should have been presented actually been put before the jury. The panel's conclusion that respondent was therefore not entitled to relief and its reversal of the district court's grant of the writ was sound.

ARGUMENT

I. The Decision of the Ninth Circuit Panel Was Based on A Proper Application of AEDPA and Its Conclusion that The District Court Erred In Granting Relief Was Sound.

It is both disturbing and frustrating that despite the length of time the Antiterrorism and Effective Death penalty Act of 1996 ("AEDPA") has now been in effect, and the many decisions of this Court providing guidance as to its application, there still remains some confusion about how a Sixth Amendment claim that counsel was ineffective must be evaluated during federal *habeas* review. More than a decade ago, in *Williams v. Taylor*, 529 U.S. 362 (2000), this Court made it very clear that the AEDPA is not "your father's §2254." In enacting AEDPA, "Congress wished to bring change to the field." *Id.* at 404. *See also id.* at 386 ("Congress wished to curb delays, to prevent 'retrials' on federal *habeas*, and to give effect to state convictions to the extent possible under law").

State criminal defendants may not look to federal *habeas* review for an opportunity to do over claims that have been decided on the merits by the state courts. AEDPA's new rule of deference only permits relief where a state court's adjudication of the merits of a claim was "contrary to or an unreasonable application of" this Court's controlling precedent. 28 U.S.C. §2254(d)(1). The writ may not be granted because the reviewing federal court believes that a state court decided a claim incorrectly. *Williams*, 529 U.S. at 411 (explaining that "[b]ecause Congress

specifically used the word "unreasonable," and not a term like "erroneous" or "incorrect," a federal *habeas* court may not grant relief simply because it concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly").

This Court's teachings have also made it clear that, when it comes to ineffectiveness claims, for which *Strickland v. Washington*, 466 U.S. 688 (1984) is the controlling precedent, *habeas* review must be "doubly deferential." *Knowles v. Mirzayance*, ___ U.S. ___, 129 S.Ct. 1411, 1420 (2009)(citing *Yarborough v. Gentry*, 540 U.S. 1, 5-6 (2003)(*per curiam*). There are two layers of deference that figure in the proper scrutiny of those claims. Not only must a state court's decision be afforded the deference effected by the standard in §2254, but a reviewing federal court's evaluation of the state court decision must also recognize that *Strickland* required the state court to be "highly deferential" and to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." 466 U.S. at 689. "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690.

Strickland's instructions about the manner in which attorney performance must be evaluated, including, specifically, that a high degree of deference always attend any scrutiny, are not mere suggestions, but are instead *mandatory*. *See* 466 U.S. at 689 (explaining that "[b]ecause of the difficulties inherent in making the evaluation, a court *must* indulge a

strong presumption" that counsel's performance was within the bounds of what was professionally reasonable)(emphasis added). *Strickland* repeatedly stresses the importance of a reviewing court's obligations to presume counsel was professionally reasonable and to guard against second-guessing or judging things in hindsight. Put another way, there is always a "default setting" of competence that can only be altered if it is established that "counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 688. *See also id.* at 690 ("counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment").

Strickland also makes unmistakable the need for flexibility when evaluating an attorney's work. *See id.* at 688 (explaining that there is no "checklist for judicial evaluation of attorney performance" and that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions how best to represent a criminal defendant"). "More specific guidelines are not appropriate. The Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance." *Id.*

A more rigid approach would be at odds with the practical reality that "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Id.* at 690 (citation omitted). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 693.

In *Strickland*, the Court pointedly referred to some of the concerns which underlie the deferential, context-based analysis it prescribes:

> The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

Id. at 690.

In this case, the Ninth Circuit panel's majority decision reflects an appropriate adherence to these principles. (P.A. 183-184) (discussing AEDPA);[2] (P.A. 185) (identifying *Strickland* as the controlling procedure of this court and discussing its requirements). The panel reached its conclusion that

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[2] "P.A." refers to the appendix that was filed with the petition for *certiorari*.

the district court erred in granting relief on this claim after determining that, with respect to the "prejudice" element, the state court decision did not involve an unreasonable application of *Strickland*.[3] (P.A. 202-222) In taking up that issue, it did precisely what it was supposed to do: it examined in detail what was contained in the record that was before the state court when it denied relief on Pinholster's ineffectiveness claim and then it considered whether, given what that record reflected, the state court decision denying the claim was objectively reasonable. *Id.*

Because the California Supreme Court did not issue an opinion detailing its reasoning—it was, of course, not required to, *see Early v. Packer*, 537 U.S. 3, 8 (2002)(a state court need not cite or discuss this Court's controlling precedent in its ruling)—the panel took an expansive approach in its review, taking into account all of what was before the state court when it ruled. As the panel observed, there was a very strong case for a capital sentence here. The double murders respondent committed were especially vicious, involving "the intentional infliction of great bodily injury." Also working strongly against respondent was the fact that during his testimony, he had not shown himself to be very sympathetic: unrepentant,

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[3] *Strickland* made it clear that a court need not address both the performance and prejudice elements necessary for an ineffectiveness claim, nor is there any obligation to consider them in any particular order. A court may choose to proceed in the way it believes to be most efficient. 466 U.S. at 697. Here, the panel opted to address "prejudice," something the Court anticipated would often be the case. *Id.* ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.")

inappropriately laughing and smirking, disrespectful of the proceedings and those involved and bragging about his criminal history. *See* (P.A. 222)("In his testimony, Pinholster portrayed himself as a career criminal who reveled in his anti-social persona.") Other evidence documented a continuous pattern of criminal conduct in his life, at times including involving violence. Given all this, it would not be objectively unreasonable for the state court to determine that presenting evidence of organic brain damage and childhood difficulties would not have affected the jury's sentencing verdict, the panel concluded. *See* P.A. 221-222. ("The California Supreme Court, which acknowledged the fact that Pinholster 'gloried' in his criminal history, could reasonably have concluded that no amount of clever "after-the-fact" assessment by *habeas* defenses psychiatrists would have convinced even a single juror to change his vote.")

Following its analysis to its logical and merited conclusion, the panel reversed the district court's grant of *habeas* relief based on this ineffectiveness claim. (P.A. 222) That should have represented the final resolution of this already much-litigated claim, but unfortunately, it was not.[4] An *en banc* court of appeals decided to eschew this properly-reasoned review of respondent's ineffectiveness claim that ultimately led it to reverse the trial court's grant of relief. This Court should now reverse the *en banc* ruling and remand for reinstatement of the panel's

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[4] As discussed, *supra*, the two-pronged test for ineffectiveness that *Strickland* established was intended to avoid "a second trial" in which the counsel's representation would be at issue. This case illustrates that all too often these claims have become the very thing the Court sought to prevent.

plainly correct disposition of this claim.

II. The *En Banc* Decision of the Ninth Circuit Fails to Afford the State Court Decision Denying Pinholster Relief on His Penalty Phase Ineffectiveness Claim Proper Deference and Should be Reversed.

1. Apparently believing that this Court's more recent decisions in *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Rompilla v. Beard*, 545 U.S. 374 (2005) required a different type of evaluation, the court of appeals, sitting *en banc*, supplanted the panel's *Strickland*-compliant analysis with its own considerably different approach. While the majority opinion is chock full of correct recitations of the governing principles of AEDPA and type of scrutiny mandated by *Strickland, see, e.g.*, (P.A. 18-22) and (P.A.24-25), there is a major disconnect between what the court said about the law and how it applied it, or more precisely, how it failed to apply it. In stark contrast to the panel's decision, the court's *en banc* ruling makes no serious attempt to ascertain whether the decision of the California Supreme Court constituted a reasonable application of *Strickland* taking into account the record that it had before it and the state court's indisputable obligations "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689.

There is no worthy reason to believe that *Wiggins* or *Rompilla* required a different type of review of Pinholster's claim than what the panel conducted. Neither of these cases altered *Strickland*'s instructions about how performance must be assayed. *See* 466 U.S. at 688 (saying that there is no "checklist

for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances"). The rulings in *Wiggins* and *Rompilla*, both of which found counsel's performance to be constitutionally sub-par, merely reflect the application of those very principles in the particular factual contexts of those cases. *See Wiggins*, 539 U.S. at 522-533; *Rompilla*, 545 U.S. at 383-388.

The facts in *Wiggins* and *Rompilla* and those here are not equivalent, or even comparable, despite the majority's efforts to try to make it appear so. As the dissent correctly clarifies, there are major differences. (P.A.94-109) In *Wiggins*, the record showed that counsel did virtually nothing to prepare for the penalty phase. Critically, they had no reason to believe investigation would be unproductive. 539 U.S. at 522-533. Here, on the other hand, counsel clearly did engage in investigation and took logical steps to mine mitigation evidence. Counsel only ceased exploring mental health issues and the defendant's background any further after learning from persons they had every reason to believe to be knowledgeable—a psychiatrist and the defendant's mother, whose information mirrored that relayed by the defendant—that there did not appear to be anything they could use in either regard. Though the majority understates the amount of time counsel devoted to this effort, as the dissent shows in concrete terms, they were suitably attentive. (P.A.98-103)

This case is also not *Rompilla*. There, this Court found counsels' performance wanting chiefly because they failed to obtain readily available and

important information that was responsive to an aggravating circumstance the Commonwealth sought to establish.[5] 545 U.S. 383-388. That particular failure to investigate basically meant there was no defense presented on this important issue. There is no parallel concern here. Counsel did not fail to present a defense; they just presented a different one than the *en banc* majority thinks they should have.

2. Instead of examining counsel's performance as ordained by *Strickland*, the *en banc* majority refocused—actually, misfocused—the discussion, essentially making it an evaluation of whether trial counsel's performance satisfied the American Bar Association's (ABA) guidelines. (P.A.35-47) There is, of course, nothing wrong with looking to the ABA Guidelines as guides, as long as they remain guides. *See* 466 U.S. at 688 (where the Court said that, in taking measure of counsel's performance, a reviewing court may look to "[p]revailing norms of practice as reflected in the American Bar Association standards and the like" as "guides to determining what is reasonable," but also stressed that "they are *only* guides")(emphasis added). *Accord Bobby v. Van Hook*, ___ U.S. ___, 130 S.Ct. 13, 16-17 (2009). *See also id.* at 20 (Alito, J., concurring)(observing that the ABA's guidelines do not have "special relevance in determining whether an attorney's performance meets the standard required by the Sixth Amendment,", nor should they "be given a privileged position"). Here, however, the majority morphed

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[5] One of the aggravating circumstances that the Commonwealth asked the jury in *Rompilla* to find was that the defendant had a significant history of felony convictions involving the use or threat of violence. *See* 42 Pa.C.S. §9711(d)(9); *Rompilla*, 545 U.S. at 378.

these guides into criteria. Its action cannot be squared with the teachings of *Strickland*. *See Van Hook*, 130 S.Ct. at 16-17 (where the Court explains that a reviewing court's undue reliance on the standards fixed by a state or by a private professional organization does not sync with the Federal Constitution's "one general requirement: that counsel make objectively reasonable choices")(quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000).

At the time of Pinholster's 1984 trial, ABA Guidelines spoke to counsel's duty to investigate the merits of a case and mitigating evidence in only the most general of terms:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admission or statements to the lawyer constituting guilt or the accused's stated desire to plead guilty.

ABA Standards for Criminal Justice §4-4.1 (2d ed. 1980). *See Van Hook*, 130 S.Ct. at 17 (describing this standard as general in nature).

The ABA Standards did not prescribe any specific course that had to be followed or dictate in

detail how counsel had to meet this obligation. To the contrary, that was left to counsel's professional judgment, something that, at least tacitly, acknowledges something about which *Strickland* was clarion: that there is a wide range of professionally-competent performance. One size does not fit all and a reviewing court must always undertake an evaluation of an attorney's representation with this in mind.

Here, after reading this aspect of the majority's opinion, one is left with a clear impression that it had a fixed view of what had to be done by counsel to satisfy ABA standards and that this fixed view served as a silent checklist for assessing attorney performance. (P.A.35-47) This is not only wrong, *see Flores-Ortega*, 528 U.S. at 479 (reiterating that *Strickland* rejects "mechanistic rules"), but this approach also transmogrifies the standard of review for ineffectiveness claims and fundamentally alters it in a way that offends *Strickland*.

What's more, in its discussion of this element, the *en banc* majority seems to presume *deficient* performance instead of starting its examination, as *Strickland* commands, with the opposite and "strong presumption" that counsel's representation was professionally reasonable. 466 U.S. at 689.

It is interesting to note the possibility that the California Supreme Court may very well have looked to this ABA Standard as a guide when it assessed Pinholster's claim and may have reached a very different, but equally valid, conclusion that counsel met their duties thereunder. Obviously, we do not have any clear indication as there was no opinion

detailing its review that accompanied its ruling, but it cannot be automatically assumed that the ABA Guidelines did not inform the state court's decision.

But even if the California Supreme Court did not take the ABA Guidelines into account, there is nothing here to suggest that it did not take a proper measure of counsels' performance. If anything, the record evinces very good reasons to conclude that it, not the federal courts, had the best perspective for making the context-based assessment that *Strickland* requires. The California Supreme Court ruled relatively close in time to Pinholster's trial and therefore could be seen to have an appropriate current temporal orientation. (P.A.27) That court, too, had deep knowledge about the nature and quality of representation at that time, especially in capital cases. Like many States, California provides for an automatic appeal in capital cases. (P.A. 305) This means that, on an ongoing basis, that court would see other examples of attorney performance and strategies that were being employed during the same time frame and would have a sense of the broad spectrum of what was constitutionally adequate representation and what was not.

How greatly the *en banc* majority veered off course can be seen in the dissent authored by Chief Judge Kozinski and joined by Judges Rymer and Kleinfield, which illustrates in very detailed and concrete terms how trial counsel's performance in the penalty phase claim should have been treated under AEDPA and the teachings of *Strickland*. Not only does the dissent carefully reconstruct the circumstances in which counsel provided professional services but also highlights the fact that there were

aspects of the record to which the majority either turned a blind eye or otherwise failed to see as an important part of the calculus. (P.A. 70-163)

As the dissent correctly recounts, this is not a case where defense counsel ignored their obligation to prepare a case in mitigation, but rather a case in which counsel did not have very many options. Pinholster's attorneys had undertaken to investigate evidence of mitigation but what they located was not helpful and did not otherwise signal that continued efforts to explore mental health issues or the defendant's background would be profitable. Counsel had retained a qualified mental health professional—a psychiatrist—to evaluate respondent but that evaluation identified no condition that might potentially be a source of mitigation. Instead, the psychiatrist reported "that Pinholster did not manifest by history any significant signs of mental disorder or defect other than Antisocial Personality Disorder." (P.A. 177) Counsel also interviewed respondent's mother to explore his background and upbringing but again learned of nothing that might be used in mitigation. The information supplied by Pinholster's mother, did not differ from what Pinholster himself had told counsel. (*Id.*)

Accordingly, at the time the defense was preparing Pinholster's case for trial, counsel had no reason to think that they should proceed further along these lines. To the contrary, they could reasonably think they had hit a dead end and that they needed to try a different tack. Absent some evidence demonstrating that, at such time, counsel had reason to believe contacting other family members or seeking out an expert to testify about organic brain damage

might be helpful, the reviewing state court was obliged to indulge the strong presumption that counsel was performing in a constitutionally-acceptable manner. Indeed, this court has made it clear that *Strickland* does not require defense to pursue what appears to be a fruitless investigation. *See Wiggins*, 539 U.S. at 533 ("we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing").

At bottom, what is clear from the *en banc* majority's opinion is that exposes no misapprehension or other error on the part of the California State Supreme Court that could lead to a legitimate determination that it unreasonably applied *Strickland*.

3. The *en banc* majority's discussion of the prejudice element of Pinholster's ineffectiveness claim is equally, if not more, flawed. In critical part, it is based on conclusory, wholly speculative "facts" relating to the impact of the evidence that counsel did not present, *i.e.*, evidence of Pinholster's purported organic brain damage and evidence of difficulties he experienced as a child. *See* (P.A. 47-70) For example, the *en banc* majority says that "evidence of Pinholster's organic brain injury *would have* humanized him in the eyes of the jury. . . ." (P.A. 53) (Emphasis added.)

In reality, there is no support in the record for the majority's stated-with-certainty views on this point. Surely, it is possible that the evidence might be received this way, but it is equally also just as

possible it might not. There is nothing in this record that tilts the balance in favor of the majority's interpretation. But this is beside the point because there is a much larger problem that quickly emerges from a review of the court's discussion, namely, that it is conducting a *de novo* review on the issue of prejudice. As the panel correctly understood, because the state court adjudicated the merits of this claim, federal review had to be governed and shaped by §2254(d)(1)'s "contrary to or unreasonable application" standard. The issue before the court of appeals was not whether the state court's ruling was correct but whether it could be seen as a reasonable application of *Strickland*. As the panel's decision explained, it clearly could; the state court reasonably conclude on the record of this case that the evidence not produced would have little or no impact. (P.A.221-222)

This assessment aligns with what experienced practitioners and the state court before which they appear know: that evidence of mental health issues or other medical problems or a difficult childhood does not always have a positive effect. It can be perceived as excuse-making; as an attempt to avoid responsibility; or as an exercise in blame-shifting. It may even make things worse for a defendant, not better. *See, e.g., Commonwealth v. Rivers*, 786 A.2d 923, 930 n. 5 (Pa. 2001)(where, discussing the possible impact of evidence of this sort, the Pennsylvania Supreme Court observed that: "It may be that upon hearing evidence of [a capital defendant's] appalling background, jurors might decide that she is incapable of rehabilitation, and deserving of the harshest punishment available"). It would therefore be reasonable for counsel representing a defendant such as Pinholster, who had committed brutal multiple

murders and who had engaged in offensive and alienating behavior in the jury's presence to choose not to go there. As Judge Kozinski's dissent aptly summed up the situation, "[t]his wasn't a case where defendant sat doe-eyed at counsel's table looking sad and contrite while others spoke for him." (P.A. 111)

Just as with the "performance" element, the *en banc* majority decision evinces no analysis from the proper perspective on this issue, and for this reason as well warrants reversal.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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